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No. 5257

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

October Term, A. D. 1934.

In re Petition of ST. JOSEPH-CHICAGO STEAMSHIP COMPANY, Owner of Steamship Eastland, for Limitation of Liability.

On Appeal of JAMES F. BISHOP, as Administrator of the Estate of WILLIAM F. RISTOW, Deceased, *et al.*,

Appellants,

vs.

ST. JOSEPH-CHICAGO STEAMSHIP COMPANY, a corporation,

Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Trial Judge.

Brief for Appellee.

Proctors for Appellants:

JUSTUS CHANCELLOR,
105 North Clark Street,
Chicago, Illinois;

HARRY W. STANDIDGE,
105 North Clark Street,
Chicago, Illinois.

Proctors for Appellee:

FREDERICK L. LECKIE,
Union Trust Building,
Cleveland, Ohio.

ROBERT BRANAND, JR.,
175 West Jackson Boulevard,
Chicago, Illinois;

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

October Term, A. D. 1934.

In re Petition of ST. JOSEPH-CHICAGO STEAMSHIP COMPANY, Owner of Steamship Eastland, for Limitation of Liability. On Appeal of JAMES F. BISHOP, as Administrator of the Estate of WILLIAM F. RISTOW, Deceased, *et al.*, *Appellants,* *vs.* ST. JOSEPH-CHICAGO STEAMSHIP COMPANY, a corporation, *Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Trial Judge.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

NATURE OF CASE AND ITS DISPOSITION IN DISTRICT COURT.

This is a petition filed by appellee, St. Joseph-Chicago Steamship Company, as owner of the Steamer Eastland, praying for exemption from and limitation of liability.

Exceptions were filed by appellants to the petition and subsequently overruled (R. 19). Answers were then filed by appellants to which appellee excepted. The exceptions were overruled. The case was referred to Lewis F. Mason, "as a Special Master to take proofs and report his findings as to the facts and conclusions as to the law" (R. 56).

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The Master was attended by proctors for both parties, evidence offered and arguments had. At the conclusion of the hearings the Master rendered and filed a report in which he found that the crew of the Steamer Eastland had been guilty of negligence in the operation thereof; that this had occurred without the privity and knowledge of appellee and that it was entitled to a decree limiting its liability in accordance with Sections 182, 183 and 184, Title 46 U. S. C. A. (R. 776-862).

Appellants filed eighty-six objections to this report (R. 864-875) and on a hearing before Judge Barnes all the objections filed by appellants to said report were overruled. The Master's report was confirmed in all things and a decree entered granting limitation of appellee's liability (R. 881-886).

Subsequently, a motion was made by appellants to vacate said decree and the whole matter was re-argued. This motion was denied and the present appeal is taken from the decree entered.

THE STEAMER EASTLAND.

The Eastland was built in 1903 for service across Lake Michigan out of Chicago. She was 265 feet long, 38.2 beam (R. 76) and drew about nine feet four inches forward and thirteen feet four inches aft, loaded. (R. 492.) From 1907 (R. 141) to 1913, (R. 150), she operated out of Cleveland, Ohio, and from 1914 (R. 113) until July 24, 1915, the date of the accident in question, she operated out of St. Joseph, Michigan (R. 574). At the present time she belongs to the Illinois Naval Reserve and is known as the Gun Boat Wilmette, having been purchased by the Naval Reserve from the trustee appointed by the Court in these proceedings.

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During the above mentioned time she was regularly inspected and licensed by the United States Government to carry from 2,000 to 3,300 passengers, depending on the life saving equipment carried. (R. 72, 82-84, 114, 141, 145, 152; Pet. Ex. 1; R. 190, 206, 207, 230, 232.) The inspectors were aboard of her at St. Joseph almost every Sunday (R. 208).

She was structurally sound and seaworthy in every respect. Every witness who touched on that subject so testified. (R. 87, 88, 98, 102, 112, 114, 115, 121, 123, 127, 138, 141, 145, 149, 153, 154, 155, 171, 185, 208, 227, 256.) There is no testimony to the contrary.

THE CREW.

The Eastland was under command of Captain Harry Pedersen. He had followed the sea for more than forty-five years. He had been a licensed master of steam vessels for thirty years. He had attended a school of navigation in Norway and had taught navigation. He was hired by Mr. Hull, vice president and general manager of St. Joseph-Chicago Steamship Company, at St. Joseph, Michigan, after furnishing references. (R. 200-203.) He had papers from the United States Government entitling him to take a ship any place in the world (R. 171).

The chief engineer was Joseph Ericson. He also was hired by Hull at St. Joseph (R. 574). He was a high class licensed engineer, had served in boats, with water bottoms and was familiar with the handling of water ballast. (R. 191-195, 363.)

Inquiries were made before these officers were hired and their reputations were found to be good. Both had demonstrated that they were competent and no complaint could be made as to the performance of their duties. R. 171-172.)

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The master upon the bridge and the chief engineer in the engine room were in charge of the vessel at the time of the accident.

THE BALLAST TANKS.

The Eastland had five water bottoms divided by a center line bulkhead making ten divisions, five on the starboard and five on the port side. (R. 77.) Any one of these divisions could be filled or emptied as desired. (R. 77.) The water flowed in by gravity but was pumped out. (R. 125.) The water entered the vessel from the main seacock which was nine or ten inches in diameter, (R. 185) into a manifold which was a cast iron box about twenty-four inches square. From the manifold led off six inch pipes (R. 175), one to each tank or compartment (R. 177). The various pipes were controlled by valves on top of the manifold (R. 178), one valve for each tank (R. 186). The tanks are numbered from forward aft, beginning with number one on each side so that there are two tanks of each number (R. 186). To put water into the tanks it was necessary to open the seacock and the valve leading to the particular tank in which the water was desired. (R. 177.)

An examination made as soon as the Eastland was raised disclosed that the water ballast equipment was in regular order and good condition. (R. 185.) Some time after the Eastland was raised an experiment was made in filling the water bottoms and timing the process. It took about twelve minutes to fill No. 2 tanks and twenty-one or twenty-two minutes to fill No. 3 tanks; No. 2 being the smaller. The vessel was light at the time. Everything was taken off that could be taken off and her draft was about a foot or eighteen inches less than at the time she capsized. In operation, with a full

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fueling of coal and 2,500 people on her, the time of filling these tanks would have been considerably less. (R. 179-185.)

The operation of the water ballast was a matter of co-operation between the master and the engineer. (R. 109, 115, 124.) The physical operation itself was in charge of the engineer. (R. 124, 125, 346, 348, 360, 362.) There was a standing order to the effect that the ballast tanks were always to be full before she left the dock. (R. 361.) The operation of these tanks depended on conditions which had to be met from time to time as they arose. It was not a matter on which the owner or those not connected directly with the navigation of the ship could exercise any control or give any directions. (R. 109, 115, 125.)

THE CHARTER.

On the day that she capsized the Eastland was under charter made by Mr. Hull to the Indiana Transportation Company (R. 574, 240.) The charterer sold the tickets and made the contract with the passengers. Mr. Greenebaum, manager of the charterer, was to designate the dock at which the Eastland was to load (R. 574, 216, 220, 227, 241.) The entire agreement for this charter is set forth in a letter from Mr. Hull to the Indiana Transportation Company (R. 588). The letter is Respondents' Exhibit 1 of January 9, 1933, and reads as follows (R. 751):

> "In answer to yours of the 2nd relative to charter for the S. S. 'Eastland,' July 24, we will agree to charter as per your request, the proposition to be handled under the same arrangement as last year, that is, $500.00 for the trip, tug service in Chicago and Michigan City, to be taken care of by you and the 'Eastland' to be the first boat to leave on the

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trip, not later than 8:15 A. M. Carrying capacity of the 'Eastland' is 2570. You will have the privilege of cancelling this agreement any time prior to July 15th, 1915."

The following letter, under date of July 16th, was written by Hull to Captain Pedersen. (Respondents' Exhibit 2 of January 9, 1933 (R. 750)):

"Dear Sir:

Relative to the trip to Michigan City for the Indiana Transportation Company. You are hereby instructed to make the necessary arrangements to land head in Friday night, July 23rd, at our docks. After the passengers have been discharged you may proceed with the boat up the river, with the assistance of the tug, wind at the 'Forks' and returning land at the Sibley Warehouse Dock, lying there overnight. Kindly report to Mr. Greenebaum, General Manager of Indiana Transportation Company, early Saturday morning, July 24th.

Upon arrival in Michigan City, kindly report to Mr. A. H. Leist, who is the agent of the Indiana Transportation Company, and who is instructed to render you every assistance in facilitating the loading and unloading of passengers and who will see that you are given tug service.

You are to leave Chicago not later than 8:15 A. M. for Michigan City. You will then immediately return to Chicago landing at our Docks, leaving Chicago at 2:00 P. M. for St. Joseph on the regular run

You will leave St. Joseph at 6:00 P. M., going to Chicago by way of Michigan City, and the boat is scheduled to leave Michigan City at 7:45 P. M. You will discharge all passengers in Chicago at our Docks.

Committee in charge of this excursion will be assigned a stateroom and a place from which they can dispense liquid refreshments gratis. They will

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> also be permitted to sell hats on board the boat. These matters will be handled by the purser. If you are not clear on this subject kindly ask for further instructions."

Pedersen received no orders from Hull other than those contained in this letter (R. 630).

Pedersen knew that Hull did not know anything about the docks in the Chicago river so he went to see Greenebaum (R. 214). At one time he thinks it was Thursday night (R. 220). At another time he says it was about 7:00 o'clock Friday evening (R. 342). Greenebaum told him what dock to go to; that the dock would be clear when he got through that night and he could come right in there (R. 224, 342).

The Eastland left her own dock after discharging her own passengers and fueling and went to the dock designated by the charterer sometime between 12:00 and 1:00 o'clock (R. 242) and lay there starboard side to the dock until the time of the disaster, about 7:30 A. M.

THE EMBARKATION OF HER PASSENGERS.

The Eastland's passengers were embarked through the after gangway (R. 314). Pedersen said that they could walk straight aboard through that gangway without striking the ladies hats. To have used the midship gangway meant that the ladies would have bumped their hats and they would probably have claims for damaged hats (R. 229).

The Eastland's certificate allowed her 2,500 passengers (R. 232). The passengers were checked aboard by Government inspectors, Lobdell and Oakley (R. 234) under the supervision of their superior officer, McCreary, who died previously to the hearing. (R. 235.) They

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counted everybody including children and babes in arms. (R. 234.) Periodically they paused to check with one another and if the indicator of one showed a higher figure, the indicator of the other was brought up to correspond. (R. 234.)

Flatow says that he checked with them. (R. 243.) He also had an indicator (R. 263) and positively states that no more than 2,500 people boarded the Steamer (R. 262). He says that when the number 2,475 had been reached, a halt was called; the inspectors stating that only twenty-five more would be allowed; that after twenty-five people had been counted on, one of his cashiers came along and wanted to get aboard; that the inspectors stated that she could board the ship only in the event someone else was put off. (R. 244.)

THE DISASTER.

The Eastland started to embark passengers about 6:30 A. M. (R. 233). After 2,500 people had boarded her and her gangways were closed she listed in toward the dock (R. 724-726.) Pedersen (R. 622) and Flatow (R. 644) state that the boat was about half loaded when she listed toward the dock. Flatow previously testified that the gangway was in; he had started forward to tell the harbor master to give them the bridge and was about amidships of the boat when she started to list; Pedersen yelled to open the gangway; Flatow ran back but before he got there the boat was over (R. 244). Again, Flatow says that she never did list toward the dock (R. 274). Lynn says that when he arrived there at about 7:18 (R. 479) he noticed that she had a list toward the dock and that this list existed at the time the gangway was put in (R. 518). The Eastland recovered from this starboard list toward the dock and came back to an even keel (R. 364-365, 375, 385, 482, 622, 623, 645, 725).

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Almost immediately afterwards she started to list to port or outboard away from the dock. This list continued until she was completely over and down on her side in the Chicago river. As a result, some 800 people or more came to their death. Others suffered personal injury, damage to property and various salvage claims arose.

Suits to the number of several hundred were instituted in this court and in the state courts.

The owner filed this petition for limitation of liability. A trustee was appointed by the Court and the Eastland surrendered to him. After she was raised she was sold by the trustee under order of Court for $46,000 and the proceeds covered into the registry of the Court.

The salvors of the ship filed their claim in these proceedings. The claim was contested by proctors for appellants and the Court found against the salvors. On appeal to this Court, the finding of the District Court was reversed. (253 Fed. 635.) Certiorari was denied by the Supreme Court (248 U. S. 578).

Proctors for appellants then filed a motion in the Supreme Court for leave to file a petition for a writ of prohibition or mandamus. This motion was denied. (251 U. S. 543).

Certain life salvors then filed claims asking to participate with the salvors of property in the fund then in the registry of the Court. The District Court held that the life salvors had not filed their claims within two years as provided by the statute and that they were barred. (262 Fed. 535.) An order was then entered directing the payment of the salvors' lien. This amount with interest and costs more than exhausted the fund of $46,000.00. There was and is nothing left.

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THE CAUSE OF THE DISASTER.

At the conclusion of the hearings before the Master, proctors for appellants submitted, among other requests for special findings, the following:

> "31. That on July 24, 1915, petitioner was guilty of negligence in operating the ballast tanks on said steamer, and such negligence caused or proximately contributed to cause said steamer to tip over on said date.
>
> 32. That on July 24, 1915, there was not a proper amount of water in the ballast tanks of said steamer and what water there was in said tanks was not properly distributed therein for the safety of the passengers who were on said steamer when it tipped over on said date." (R. 766.)

Proctor for appellee submitted requests for special findings, among others, the following:

> "Eight. That said Steamer Eastland was fitted in the usual manner with water ballast tanks and proper equipment for handling the same; that the manipulation of said water ballast tanks is a purely operating matter to be determined by the officers of the ship as the occasion may require. The record shows that at times they put water ballast in said tanks and at other times pumped it out and at times in one tank and some times in another and that they pumped it out of such tanks as the occasion might require; that the testimony is to the effect that this handling of water ballast tanks is a matter left entirely to the judgment and discretion of the officers of the ship and that no owner or manager could possibly determine in advance what should or should not be done with such water ballast as that must necessarily be left to those in charge, licensed and skilled, and with knowledge of the local situations and present conditions which are constantly changing; that the water ballast was all pumped out of

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the steamer's tanks before going to this dock for embarking her passengers; that the master had some reason, either at the time of loading or subsequently thereto, to suspect that the water ballast tanks had not been properly handled; that the testimony further shows that the starboard tanks were found empty and the port tanks filled so that the only conclusion that can be drawn from all the testimony is that the ballast tanks were improperly handled and that this was the proximate cause of the unfortunate accident which happened; that this was entirely a matter of operation and connected with the navigation of the vessel with which the owner could not and did not have any privity or knowledge." (R. 772.)

The Master stated (R. 819):

"It is also to be remarked that neither petitioner nor respondents have requested any other finding which specifically points to the cause of the disaster. Such a finding not only finds support in the testimony but is in accord with the previous record in these proceedings."

The Master then found (R. 820-821):

"After carefully considering all of the evidence I am of the opinion that the only plausible and reasonable explanation of the disaster that overtook the Steamer Eastland lies in the improper operation of her ballast tanks, and that this was the proximate cause of her capsizing and sinking, and I shall find, as requested by respondents, that petitioner was guilty of negligence in the operation of the ballast tanks on said steamer and that such negligence caused the said steamer to tip over on said date, and that at the time of the capsizing of said steamer there was not a proper amount of water in her ballast tanks, and that what water was in said tanks was not properly distributed therein for the safety of said steamer and her passengers."

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The District Court concurred in this finding (R. 884).

Pedersen testified that the tanks had been pumped out the night before in order more conveniently to discharge her passengers and that they were emptied before they went to this dock. (R. 343-344.)

Lynn testified that an investigation demonstrated that the tanks toward the dock had hardly any water and that there was plenty of water in the outboard or opposite tanks (R. 495) also that there were not many passengers on her starboard side. (R. 483.)

Bangs was the first one in her engine room after she was raised. (R. 176.) He says that the valves to Nos. 2 and 3 tanks on the starboard side were open, indicating that they were putting or attempting to put water in there when she went over. (R. 179).

The master on the bridge at the time (R. 348) was wondering why she did not recover from her list (R. 347) and at that time it was his feeling that some refuse from the river, such as newspapers, had blocked up the intakes and prevented the tanks from filling. (R. 351.)

There is not any conflict in the evidence with respect to the foregoing theory of the accident which was advanced by both parties in their requests to the Master for special findings. The appellant, however, makes an additional suggestion, which is in conflict with the first and about which the evidence is conflicting. This second suggestion is that the vessel was resting on some obstruction on the bottom. The Master and the Court found against this theory.

Flatow testified that after the disaster, divers found obstructions, such as piling on the bottom of the river and while he did not remember the measurements exactly, there was nowhere the depth of water that there should have been at that time; that one piling was cut

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off and taken to Grand Rapids as evidence; that the depth of water over this piling was around seven feet; that about amidships the sheeting of the dock had broken out and debris from underneath the dock had slid out into the river (R. 246-247) for a distance of eight or nine feet (R. 259) and that at the time of the disaster the water was about one and one-half to two feet below normal; that his opinion, from the soundings, was that the Eastland was on the debris amidships, solid in the mud forward and on the piling aft. (R. 246-248.) The draft of water fluctuates rapidly when the locks to the Chicago Drainage Canal are open; they were open this morning and that presumably had something to do with it, but that different elements would bring about that condition (R. 278); that after the accident, refuse was taken from there, quite a lot of stuff. (R. 400-401.)

Pedersen, when recalled by appellants, testified that it was his opinion that she was on an obstruction on the bottom and that is what caused her to tip over (R. 351); he came to this conclusion when he saw the piling in Grand Rapids; the water was about eight inches lower than usual that morning (R. 230); that immediately after the Eastland tipped over he saw a spot on her hull where the paint was rubbed off, about seven to eight feet forward of the after gangway (R. 355); he thinks that the piling made that mark (R. 371); it appeared to be a fresh mark, not exactly round and the hull was not disturbed in any way or dented (R. 380); he saw no other marks on her bottom. (R. 371.)

Witness O'Neill, an attorney, testified that in the neighborhood of six months or a year before the Eastland tipped over, a three-story brick building at the southeast corner of LaSalle street and the river collapsed and the north end and west side for approximately half its length fell into the river; that approximately ten

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to twenty thousand brick from that part of the building went into the river (R. 423-428); he further testified that he was riding on the Northwestern Elevated on a southbound train on the morning of the disaster and the train was stopped on the bridge over the river at Wells street; he was approximately 150 yards from the Eastland and he saw her settle down in the water until she rested upon this pile of brick and tipped over toward the north. (R. 428, 432.)

He testified that he usually arrived at his office about 9:00 o'clock in the morning; that he was on his way to the office when he saw this disaster and that he would have arrived there that morning at about the usual time except for the delay caused by the disaster and his attempt to visit the scene thereof. (R. 439.)

After O'Neill testified, Flatow was recalled. (R. 466.)

He testified that the rear end of the building fell in; one whole corner and a part of a whole side; that this occurred some six to eight months before the Eastland tipped over, maybe a year; he was not there when it fell but he saw that a part of the building had fallen (R. 471); he reiterated this subsequently; that the part that caved in was the entire northwest corner. (R. 672.)

On cross examination and being confronted by a photograph of the building, he modifies his statement and says that there was a hole about six feet wide in the foundation (R. 674); that the damage was repaired; he saw men working on it (R. 677); that there was a saloon in there at the time of the disaster although it might have been a commission house; possibly both. (R. 679.)

He identified Libelant's Exhibit 1 of March 31, 1933 (R. 752) as a picture of the building that he had been describing and points out the baggage room and the little porch there out of the saloon and then says that the

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hole was in the foundation; that it came up to the dock and was caused by the water washing away the foundation; that they tore the dock out and repaired it; that the upper portion of the building was intact; it was all there. (R. 680-683.)

Pedersen saw nothing wrong with this building on the morning of the disaster. (R. 456.)

Joseph R. Lynn, a licensed steamboat master for thirty-nine years as well as a licensed marine engineer, was first assistant harbor master at the time (R. 478-479); he was detailed to the dock where the Eastland was loading and arrived there some six or seven minutes before she had embarked all her passengers (R. 480); after the disaster he, with others, was engaged in making an investigation; the dock was divided into stations ten feet apart, going east; he took a three-quarter inch gas pipe with steel tape attached to it and a block of wood on the lower end by means of which they took measurements of the depth of water; they took measurements out every four feet at each station; at four feet off the dock they found twelve feet four inches of water at fully one-half the stations; at one place only there was between nine and ten feet; that was next to the last station towards the bridge, east; after they got beyond four feet from the dock they found nothing less than seventeen feet ten inches, and the Eastland, after she capsized, was lying in about twenty-two feet of water. Her loaded draft was nine feet four inches forward and thirteen feet four inches aft. As a result of his investigation he came to the conclusion that it would be impossible for her to be on the bottom and there were no obstructions upon which she could rest. (R. 488-496.)

He examined her hull and found no marks on her bottom (R. 505-506); there were no piles driven in the river; they did find a pile that had been pulled out from under

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the dock and which was sawed off afterwards. (R. 507-508.) This pile was sawed off in October. (R. 517.) He testified at the coroner's inquest and at that time he believed that the boat was on the bottom and so stated, but at that time he had no facts to go on and subsequently after investigation and soundings changed that opinion. (R. 527-540.)

After the Eastland was removed and complete soundings were made from the west line of LaSalle street to ten to fifteen feet east of where her bow lay and out as far as where she lay when capsized, he then knew that it was impossible for her to be on the bottom with the amount of water there found. (R. 541.)

On the night that the Eastland was taken away, the freighter "Neptune," about 350 to 360 feet long and forty-odd feet beam, loaded to a draft of eighteen feet six inches to eighteen feet ten inches, lay at that dock, loaded, waiting for bridge hours. He went aboard of her at her after end. She was heading west and about five feet off the dock. He put his foot on her cable, reached for the rail and pulled himself aboard. (R. 508-509.) The fact that the Neptune lay at that berth with over 100 feet of her extending east of the easterly line of LaSalle street and drawing eighteen feet six inches, confirmed him in his opinion that it was impossible for the Eastland, drawing less than fourteen feet, to be on the bottom when she capsized. (R. 541-542.)

Flatow also testified as to the Neptune's being there. (R. 661.) He places the time as a week after the Eastland was taken away, or it might have been two days. (R. 664.) He has her six or eight feet out from the dock and headed east, going out into the lake. (R. 662.)

Lynn also testified with reference to the building at the southeast corner of LaSalle street and the river. He says that the building was intact at the time and had

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never caved in. The basement was used as a baggage room for the South Haven Line and the divers used it as a dressing room while they were making an investigation subsequent to the disaster. It was occupied on the next floor by a restaurant; that soundings were made in the vicinity of this building and that the bottom was the same there as everywhere else, namely, soft mud. There was no pile of bricks. He took the photograph (R. 749) in evidence as Petitioner's Exhibit 1 of November 29, 1932; that the same truly represents the building under discussion. (R. 497-501.)

Pedersen (R. 465), Lynn (R. 506), and Herriman (R. 562-564) all testify that the fact that the Eastland listed first in toward the dock and then came back to an even keel (R. 364, 365, 385, 482, 622, 623, 644, 725) indicated that she was free in the water and not resting on anything under her starboard bilge. Flatow agrees with this but says she never did list to starboard. (R. 274.) Herriman says that if she did impinge upon the pile it might cause an indentation or possibly puncture the plate. (R. 566.) Pedersen says the plate was not dented. (R. 380.)

As the Eastland was embarking her passengers she lay at somewhat of an angle to the dock her bow being some twenty-one or twenty-two feet off and her stern pulled right into the dock for the purpose of loading passengers at the after gangway. At the after gangway she was hauled up close to the spring piling, there being about four feet between her and the dock proper at that point. (R. 486-487.) She had three lines out; a head line, a breast line and a spring line. As she started on her outboard list, Lynn put his foot on her breast line and heard a crack and then the pile broke. (R. 484.) As the Eastland went over she completely reversed her alignment with the dock, her breast line rendered off,

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and her stern was at least thirty-five feet out from the dock and you could just barely get around her bow. (R. 488.)

THE DOCK.

The dock at which the Eastland capsized was on the main channel of the Chicago River, just west of Clark street bridge. (R. 203, 241, 479.)

It was owned by the City of Chicago and leased to the Chicago and South Haven Steamship Company. (R. 596.) It was used by that concern regularly for the docking of their steamers, the City of South Haven and the Petoskey. (R. 264, 358, 511, 598.) The South Haven had a greater draft than the Eastland. (R. 513.) Flatow, however, says the Eastland had the greater draft. (R. 660.) The same dock had been used by Flatow for a great many years for landing passenger steamers. (R. 275, 277, 322.) He says that he had no knowledge of anything wrong with it previously to the disaster. (R. 270.) The same is true of Pedersen. (R. 369, 378.) He had taken the Eastland there the previous year (R. 206, 355) although Flatow says not. (R. 308.)

Lynn says that it was the duty of his office to maintain all docks in a safe condition; that he considered this dock a safe berth for boats of the size of the South Haven and the Petoskey. That the Eastland drew less water than the South Haven and that he certainly considered it a safe dock for the Neptune when he placed her in this berth. (R. 513.)

Greenebaum, manager of the Indiana Transportation Company, designated this dock as the place for the Eastland to embark his passengers. (R. 205, 209, 313, 342, 460, 574.) Pedersen says that if he had any reason to suspect the berth he would not have taken the Eastland in there and would have so informed anyone requesting him so to do. (R. 386.)

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THE OWNER OF THE EASTLAND.

The Eastland was owned by the St. Joseph-Chicago Steamship Company, a Michigan corporation. (R. 2.) Mr. Arnold, residing at Mackinac Island, was the president. He was not active. Mr. William H. Hull of St. Joseph, Michigan, was vice-president and general manager. Mr. Steele was secretary and treasurer. Both Hull and Steele resided at St. Joseph, Michigan, and were the active managers of the business. The general offices of the company, where it carried on its business, were in St. Joseph, Michigan. In addition to the Eastland, the company owned the steamer Eugene Hart. Both these ships were laid up, when not in use, in the canal at Benton Harbor, Michigan; they were fitted out from the same place and were managed from the office in St. Joseph. (R. 572, 573.)

Mr. Hull hired the captain and chief engineer at the office at St. Joseph, Michigan. The regular route for the steamers was between St. Joseph to Chicago and return. (R. 574.) There were no officers of the owner present in Chicago at the time of the disaster. (R. 209, 574.) The owner's agent in Chicago was the Northern Michigan Transportation Company. The general manager of that company, Mr. Seymour, had charge of the owner's business in Chicago. (R. 584.) They sold all the tickets, docked the steamer at Rush street bridge and collected the freight (R. 582, 585) both in and out bound on a commission basis. The money so collected, less this commission, was turned over to the St. Joseph-Chicago Steamship Company at St. Joseph, Michigan. (R. 611-614.)

MARTIN FLATOW.

Martin Flatow testified at five hearings before the Master; on each occasion he was called by appellants.

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(R. 239, 300, 396, 466, 634.) He first testified that he was excursion agent and assistant manager. (R. 239.) Later he says he was not president, secretary, vice-president or treasurer. He testified that he was Chicago manager, excursion agent, advertising agent and dock superintendent. He says he superintended the Rush street dock. (R. 330.) He was not a director; outside of the claimed title of general manager at Chicago, he had the title of excursion agent, dock superintendent, advertising agent; "in fact I had all the titles here." (R. 407-408.) No one else, to his knowledge, handled any of the business of the St. Joseph-Chicago Steamship Company in Chicago on or before July 24, 1915. (R. 475.) Previously he had testified that all freight was delivered to the Northern Michigan Transportation Company; they collected for this freight and deducted their percentage. (R. 406.)

Mr. Hull hired Flatow (R. 581-582.) Hull describes Flatow as a solicitor in Chicago for the passenger business; he was not an officer of the company, director or a stockholder and had no authority as general manager; he had no authority over the master of the Eastland nor any authority as to the selection of the dock at which the Eastland embarked her passengers. He had nothing to do with navigation. (R. 324.) He solicited excursions (R. 582), of clubs and organizations. He had no authority to charter the boat; the charter parties were referred to the main office. (R. 587.)

J. C. Conley, appellants' own witness (R. 609) says Flatow's duties were to contact lodges, societies and other organizations with a view of obtaining charters for excursions on the Eastland. (R. 612.)

Pedersen says that Flatow was general manager in Chicago. (R. 339.) He handled all the business matters as to the Eugene Hart and the Eastland. In St. Joseph

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Pedersen received orders from Mr. Hull; in Chicago, from Flatow (R. 340); Flatow would instruct Pedersen with reference to different things about the boat but never with reference to her navigation or the use of the ballast tanks. (R. 367.) Pedersen took orders from nobody with reference to the navigation; he was the sole navigator and the responsible party. Flatow told Pedersen when the passengers were on and would give him the "high sign" when to go. (R. 372-373.)

Flatow's own conception of his duties is as follows: Specifically, as concerns the charter, he was to see that the boat got to the dock provided by Greenebaum and that the help was there to take care of the passengers. (R. 241.) Generally, Pedersen was in charge of the boat (R. 242); he, Flatow, had no experience in navigating the boat (R. 248); he was merely the agent who negotiated the sale of these services with people who wanted to give excursions. (R. 249.) He was not a corporate officer but merely a hired man working for a salary. (R. 260.) He had full charge of the Eastland in Chicago and everything pertaining to it; bought most of the supplies, made all charter parties, had charge of the advertising and was a stockholder in the company. When he stated that he had full charge of the steamer Eastland he did not mean her navigation; he was talking about the business end. Her navigation was solely in charge of her master, Pedersen (R. 324) and his orders, in so far as the steamer Eastland was concerned, were simply with reference to the business end of her operation. (R. 325.)

He would occasionally hold the boat to accommodate passengers but Pedersen was the master and he was in sole charge. (R. 326.) The question as to whether there was sufficient water at the dock he left entirely to the judgment of the master. He, Flatow, knew nothing about

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such matters. (R. 335.) He did not have charge of the crew; he never had charge of feeding them; he bought some provisions occasionally under the direction of the steward or an officer. (R. 687.)

APPELLANTS' STATEMENT.

We have made a rather full statement of the facts because we feel that appellants have not complied with the rule in that a great many of their facts are mere conclusions and that in instances where there is a conflict both versions are not stated.

For instance, we cannot agree that Flatow was, in any sense, a managing agent of appellee in Chicago or elsewhere; that it would have been dangerous to load passengers at the midship gangway; that there were any orders from Mr. Hull to load 2,500 passengers; that Captain Pedersen did not have a permit to take the Eastland to said dock; that he did not know the steamer was to be loaded at that dock until about the time that the loading was begun; that the water was a couple of feet lower on this occasion; that the South Haven did not draw more water than the Eastland; that the record shows that the chief engineer complied with the standing order to have the ballast tanks full before leaving the dock; that the ballast tanks were the cause of the capsizing rested only upon the testimony of Lynn; that the listing occurred when the steamer was about three-quarters loaded.

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CONTESTED ISSUES.

Under the above caption, appellants' brief (p. 11) contains twelve numbered paragraphs, each purporting to set forth a contested issue. The rule requires a brief statement of the contested issues. The purpose is, manifestly, to assist the Court in its consideration of the case.

With due deference we submit that this purpose has not been accomplished and that many of the specifications do not constitute contested issues.

As appellee views the record and the points raised in appellants' brief, the contested issues are:

1. What was the cause of the disaster?
   (*a*) Was it unseaworthiness?
   (*b*) Improper dock; or
   (*c*) Improper handling of ballast.

2. Was the disaster caused with the privity and knowledge of appellee?

3. The legal effect, if any, of the charter party upon appellee's right to limitation.

4. Is the Limitation Statute to be construed as applying only to conditions after the moment of breaking ground for a voyage?

5. The rulings on the admission or rejection of evidence.

6. Appellant's right, if any, to a jury trial.

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PROPOSITIONS OF LAW AND AUTHORITIES.

I.

THREE PROPOSITIONS OF LAW APPLICABLE.

(a) *The findings of a Master in Admiralty, when affirmed by the District Court, are treated by the Circuit Court of Appeals as conclusive and unassailable.*

Davis v. Schwartz, 155 U. S. 631 at 636.

The June Ames, (C. C. A. 2) 66 F.(2d) 415 at 416.

Continental Corporation v. National Union Radio Corporation, (C. C. A. 7) 67 F.(2d) 938 at 942.

Toledo Steamship Co. v. *Zenith Transportation Co.*, (C. C. A. 6) 184 Fed. 391, 399.

(b) *Where a lower Tribunal has had the opportunity to see and hear the witnesses testify, that Tribunal's findings on issues of fact depending upon the credibility of witnesses, should not be disturbed.*

The Clermont, (C. C. A. 2) 287 Fed. 136.

The F. B. Squire, (C. C. A. 2) 248 Fed. 469 at 470.

The Fulton, (C. C. A. 2) 54 F.(2d) 467.

(c) *Where two lower Tribunals have passed upon questions of fact and have concurred in their findings therein an Appellate Court should accept such findings.*

The Wildcroft, 201 U. S. 378 at 387.

Oelwarke Teutonia v. *Erlanger,* 248 U. S. 521 at 524.

United States v. *Boston Sand & Gravel Co.*, (C. C. A. 1) 23 F.(2d) 839.

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II.

THE LIABILITY OF APPELLEES SOUGHT TO BE ENFORCED HEREIN IS NOT ONE RESTING UPON ITS PERSONAL CONTRACT, AND IS WITHIN THE PROTECTION OF THE LIMITATION STATUTE.

(a) *To receive consideration, such an issue must rest on the allegations of appellants' answers.*

Supreme Court Adm. Rule 53.

(b) *The decree must rest not only on the evidence but on the pleadings as well.*

City of Chicago v. *Goodrich Transit Co.*, (C. C. A. 7) 4 F.(2d) 636, 637.

(c) *An implied warranty of seaworthiness is not to be extended to cover acts of negligence on the part of the crew without the privity or knowledge of the owner.*

The No. 34, (C. C. A. 2) F.(2d) 602, 607.

The Ice King, (C. C. A. 2) 261 Fed. 897, 899.

The Soerstad, 257 Fed. 130, 131.

(d) *Vessel owners have the right to limitation as against passengers, where the injury or death is due to operating negligence.*

Butler v. Boston S. S. Co., 130 U. S. 527, 552.

La Bourgogne, 210 U. S. 95.

The Titanic, 233 U. S. 718.

The Princess Sophia, (C. C. A. 9) 61 F.(2d) 339, 345 (certiorari denied, 288 U. S. 604).

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III.

THE FACT THAT THE EASTLAND TIPPED OVER WHILE AT THE DOCK AND BEFORE SHE HAD BROKEN GROUND ON HER VOYAGE PRESENTS NO REASON FOR DENYING LIMITATION OF LIABILITY TO HER OWNER.

(a) *The owner is entitled to limitation notwithstanding the fact that the Eastland was not on a voyage at the time of this accident.*

Lehigh Valley R. R. Co. v. Jones, 50 F.(2d) 828.

In re Michigan Steamship Co., 133 Fed. 577 (reversed on other grounds 144 Fed. 788).

The C. H. Northam, 181 Fed. 983.

The Sunbeam, 195 Fed. 468.

Eastern Steamship Co. v. *Great Lakes Dredge & Dock Co.,* 256 Fed. 497.

The Snug Harbor, 46 (F.(2d) 143.

Patton-Tully Transportation Co. v. *Turner,* 269 Fed. 334.

In re Highland Navigation Corporation, 24 F. (2d) 582 (affirmed 29 F.(2d) 37).

The Muriel, 25 F.(2d) 505.

The South Shore, 29 F.(2d) 207 (affirmed 35 F. (2d) 110, certiorari denied 281 U. S. 722).

(b) *The distinction between the Harter Act and the Limitation Statutes.*

The Colima, 82 Fed. 665, 669.

Southern Pacific Co. v. *United States,* (C. C. A. 2) 72 F.(2d) 212, 215.

The Galileo, 54 F.(2d) 913 (affirmed 287 U. S. 420).

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IV.

THE EASTLAND AT THE TIME OF THE CAPSIZING WAS IN EVERY RESPECT SEAWORTHY.

(a) *Presumptions cannot be indulged in contrary to established facts.*

The South Coast, (C. C. A. 9) 71 F.(2d) 891, 893.

Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387, 389.

Osborne v. Osborne, 325 Ill. 229, 231.

Woodward v. *Chicago, M. & St. P. Ry. Co.,* (C. C. A. 8) 145 Fed. 577, 580.

(b) *A presumption of unseaworthiness arises only when nothing but unseaworthiness can explain the accident.*

The Carroll, 60 F.(2d) 985, 990, 991.

The Transit, (C. C. A. 3) 250 Fed. 71, 72.

The South Coast, (C. C. A. 9) 71 F.(2d) 891, 894.

(c) *There is a distinction between structural unseaworthiness with the privity and knowledge of the owner, and negligent operation or mismanagement on the part of the crew, without owner's privity and knowledge.*

The Ice King, (C. C. A. 2) 261 Fed. 897, 899, (certiorari denied, 251 U. S. 559).

The Galileo, (C. C. A. 2) 54 F.(2d) 913, 914 (affirmed, 287 U. S. 420).

The South Coast, (C. C. A. 9) 71 F.(2d) 891.

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(d) *Corporations, as well as individuals, are entitled to limitation against damage arising from conditions to which they are not privy and of which they have no knowledge.*

Standard Wholesale P. & A. Works v. Chesapeake L. & T. Co., (C. C. A. 4) 16 F.(2d) 765, 766.

Wessel, Duval & Co. v. Charleston L. & T. Co., 25 F.(2d) 126, 130.

The South Coast, (C. C. A. 9) 71 F.(2d) 891, 894.

Pocomoke Guano Co. v. *Eastern Transp. Co.*, (C. C. A. 4) 285 Fed. 7.

(e) *Appellants must establish a causal relation between the alleged fault of appellee and the disaster.*

Bronx Barge Corp. v. Connelly Transp. Co., (C. C. A. 4) 35 F.(2d) 294, Syl. 4.

The El Sol, 45 F.(2d) 852, 855.

The Cullen No. 32, 45 F.(2d) 859, 863.

The Carroll, 60 F.(2d) 985, 990.

Southern Pacific Co. v. *United States,* (C. C. A. 2) 72 F.(2d) 212, 215.

(f) *A presumption cannot be predicated upon another presumption.*

Looney v. Metropolitan R. R. Co., 200 U. S. 480.

Manning v. Insurance Co., 100 U. S. 693.

45 Corpus Juris, 1146.

Globe Accident Ins. Co. v. *Gerisch,* 163 Ill. 625, 628, 629.

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V.

THE CAUSE OF THE DISASTER IS FULLY EXPLAINED BY THE FINDINGS. THE EASTLAND WAS IN ALL RESPECTS SEAWORTHY AND THEREFORE THERE IS NOTHING TO EXPLAIN WITH RESPECT TO ALLEGED UNSEAWORTHINESS.

(a) *Appellants, having asked the Master to make a finding and the Master having made the finding as requested, are estopped from complaining of the same.*

Davis v. *Wakelee,* 156 U. S. 680.
Gering v. *Leyda,* (C. C. A. 8) 186 Fed. 110, 113.
Jefferson Standard Life Insurance v. *Wilson,* (C. C. A. 5) 260 Fed. 593, 595.

(b) *The issues involved are:* (1), *Is there any liability at all, and;* (2) *Is appellee entitled to limit that liability? On the first, the burden was on appellants; negligence once established the burden shifts to appellee to show that it was without its privity and knowledge.*

Hartford Acc. Co. v. So. Pacific, 273 U. S. 207, 215.
Southern Pacific Co. v. United States, 72 F.(2d) 212, 215.
The Rambler, (C. C. A. 2) 290 Fed. 791, 792.
The 84-H (C. C. A. 2) 296 Fed. 427, 431.
The Linseed King, 24 F.(2d) 967, 970.
The Rose Standish, 26 F.(2d) 480, Syl. 2.
The Commonwealth, 31 F.(2d) 142, 145.
The Suduffco, 33 F.(2d) 775, 776.
The Princess Sophia, 35 F.(2d) 736, 739.
The El Sol, 45 F.(2d) 852, 855.
Re Petition of McAllister, 53 F.(2d) 495, 496.

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(c) *The master of the Eastland was entitled to rely upon the good reputation of the dock at which the Eastland berthed.*

The Marlborough, 47 Fed. 667, 672.

The Gildersleeve No. 339, (C. C. A. 2) 68 F.(2d) 845, 847.

The Aetna Insurance Co. v. Davidson S. S. Co., (C. C. A. 7) 257 Fed. 68, 69.

M. & J. Tracy, Inc. v. *Marks Lissberger & Son,* (C. C. A. 2) 283 Fed. 100, 102.

Slater Fireproof Storage Co. v. *Nicholson Transit Co.,* (C. C. A. 7) 47 F.(2d) 734.

Sparks Milling Co. v. *United States,* 5 F. Supp. 567.

(d) *He was also entitled to rely on Government charts.*

The Nathan Hale, (C. C. A. 2) 99 Fed. 460, 462.

(e) *Local harbor tugs are charged with a knowledge of the draft of water and all obstructions in their home port.*

Vessel Owner's Towing Co. v. *Wilson,* (C. C. A. 7) 63 Fed. 626, 630.

Great Lakes Towing Co. v. *Alva S. S. Co.,* (C. C. A. 7) 261 Fed. 261, 262.

(f) *The theory of an improper berth as a proximate cause of the disaster rests upon conjecture. The record fails to establish it.*

The Onward, 6 F. Supp. 45.

The L. D. Potter, 34 A. M. C. 646, 647.

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VI.

THE CAPSIZING OF THE EASTLAND WAS WITHOUT THE PRIVITY OR KNOWLEDGE OF THE APPELLEE.

(a) *The material words of the statute are "without the privity, or knowledge of such owner."*

Title 46, Sec. 183, U. S. C. A.

(b) *The rule of construction to be applied is that of liberality.*

Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 588-589.

Evansville and Bowling Green Packet Co. v. Chero Cola Co., 271 U. S. 19, 21-22.

Lehigh Valley R. R. Co. v. Jones, (C. C. A. 3) 50 F.(2d) 828, 829.

Petition of Wheeler, 51 F.(2d) 374, 377.

(c) *Privity and knowledge of the owner means personal participation by the owner.*

The Indrapura, 171 Fed. 929, 938.

The Pere Marquette No. 18, 203 Fed. 127, 131.

The Oneida, (C. C. A. 2) 282 Fed. 238, 241.

The 84-H, (C. C. A. 2) 296 Fed. 427, 431.

The Princess Sophia, (C. C. A. 9) 61 F.(2d) 339.

The El Sol, 45 F.(2d) 852, 855.

The Yungay, 58 F.(2d) 352, 355.

The Admiral Fiske, 41 F.(2d) 718, 720.

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(d) *In the case of a corporate owner the privity or knowledge must be that of a managing officer.*

Craig v. Continental Ins. Co., 141 U. S. 638, 646.
The Princess Sophia, (C. C. A. 9) 61 F.(2d) 339, 352.
The Pere Marquette No. 18, 203 Fed. 127, 131.
Pocomoke Guano Co. v. *Eastern Transp. Co.*, 285 Fed. 7, Syl. 2.

(e) *The master alone was in charge of the navigation of the Eastland.*

The Admiral Fiske, (C. C. A. 9) 41 F.(2d) 718, 720.
Butler v. Boston S. S. Co., 130 U. S. 527.
The North Star, 3 F.(2d) 1010, 1011.
The Princess Sophia, (C. C. A. 9) 61 F.(2d) 339, 350.

(f) *The law does not require that vessel owners shall have knowledge of the building, upkeep, management or navigation of ships. Neither does it require that the owner place an intermediary between itself and the master who shall possess such knowledge.*

Quinlan v. *Pew,* (C. C. A. 1) 56 Fed. 111, 118.
Boston Marine Ins. Co. v. *Metropolitan Redwood Co.,* (C. C. A. 9) 197 Fed. 703, 709.
The Annie Faxon, (C. C. A. 9) 75 Fed. 312, 315.

(g) *A local passenger agent, even if Flatow were such, is not a managing agent of a corporate owner within the meaning of the Limitation Statute.*

The Princess Sophia, (C. C. A. 9) 61 F.(2d) 339, 352.

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VII.

THERE WAS NO ERROR IN THE REJECTION OF EVIDENCE BY THE COURT.

Southern Pacific Co. v. *United States,* (C. C. A. 2) 72 F.(2d) 212, 215.

VIII.

APPELLEE ALLEGED AND PROVED FACTS ENTITLING IT TO LIMITATION OF ITS LIABILITY.

See argument.

IX.

APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL AND THE COURT DID NOT ERR IN DENYING THEIR REQUEST THEREFOR.

(a) *There is no constitutional right to a jury trial in the admiralty jurisdiction.*

Crowell v. *Benson,* 285 U. S. 22, 45.
Waring v. *Clark,* 5 How. 441, 459-460.

(b) *The right to a jury trial must be predicated on the Statute of 1845.*

Title 28, Sec. 770, U. S. C. A.

(c) *One purpose of Limitation Statutes is to avoid multiplicity of suits.*

Butler v. *Boston S. S. Co.,* 130 U. S. 527, 552.
Hartford Acc. Co. v. *So. Pacific,* 273 U. S. 207, 215.

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(d) *The jurisdiction of the Federal Court in matters concerning limitation of liability, where there is more than one claimant is exclusive.*

Langnes v. *Green,* 282 U. S. 531, 539.
The Mistral, 50 F.(2d) 957, 958.
The Lake Ellendale, 53 F.(2d) 415.

(e) *A jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up.*

In re East River Company, 266 U. S. 355, 368.
The Victoria, 3 F.(2d) 330, 331.

(f) *The Statute of 1845 has been strictly construed.*

Gillette v. *Pierce,* Fed. Cas. 5437.

(g) *The verdict of a jury under the Statute is advisory only.*

The Empire, 19 Fed. 558.
Sanderson v. *City of Toledo,* 73 Fed. 220.
The C. F. Bielman, (C. C. A. 7) 288 Fed. 833, 835.

(h) *A jury trial in these proceedings approaches the impossible.*

The Rochester, 227 Fed. 203, 205.
The Victoria, 3 F.(2d) 330.

(i) *The Statute of 1845 rises to no higher dignity than the Jones Act, Title 46, Section 688, U. S. C. A. A seaman, notwithstanding the Jones Act, has no right to a jury trial in the event of proceedings to limit liability.*

In re East River Company, 266 U. S. 355, 368.

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X.

APPELLANTS ALLEGE ERROR BECAUSE THE DISTRICT COURT DID NOT MAKE ALL THE FINDINGS REQUESTED BY THEM; BECAUSE THE COURT OVERRULED THEIR OBJECTIONS AND EXCEPTIONS TO THE REPORT OF THE MASTER; AND BECAUSE IT MADE THE FINDINGS IN SAID DECREE, AND ENTERED SAID DECREE.

(a) *Objections and exceptions to the rulings of the Court should be specific and not general.*

The Commander in Chief, 1 Wall. 43.
The Waiontha, 122 Fed. 719, 722.

(b) *The Statute of 1875 dealing with separate findings by the old Circuit Court has no application to the Circuit Court of Appeals.*

Munson S. S. Line v. *Miramar S. S. Co.,* (C. C. A. 2) 167 Fed. 960.

The Nyack, (C. C. A. 7) 199 Fed. 383, 386.

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ARGUMENT.

I.

THREE PROPOSITIONS OF LAW APPLICABLE.

(a) *The findings of a Master in Admiralty, when affirmed by the District Court, are treated by the Circuit Court of Appeals as conclusive and unassailable.*

Davis v. *Schwartz,* 155 U. S. 631 at 636:

> "As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. Stat. Sec. 649, or in an admiralty cause applied to this case. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

The June Ames, (2 C. C. A.) 66 F.(2nd) 415 at 416:

> "The issue depended upon whom to believe, and the commissioner's finding in such a case, certainly when confirmed by the judge, is conclusive. This seems a hard lesson for the bar to learn, but we will not slacken our rule regarding it."

We do not find any reported admiralty case in which this Court has had occasion to apply this rule but we do

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find that this Court has consistently applied the rule in equity cases, the most recent being that of *Continental Corporation* v. *National Union Radio Corporation,* 67 F.(2nd) 938, where this Court, on page 942, says:

> "The evidence having been heard by the Special Master and he having seen the witnesses and examined all of the exhibits admitted in evidence, and the Court having affirmed the findings of the Special Master, this Court is not at liberty to disregard it and can go no farther than to see that a decree in harmony with the findings and holdings thus approved is entered." (Citing authorities.)

The reasons on which the rule is based apply with equal force to an admiralty case, in fact, it is well settled that courts of admiralty function on equitable principles and according to the laws of natural justice. As the Court said in *Toledo Steamship Company* v. *Zenith Transportation Co.,* (C. C. A. 6) 184 Fed. 391 on page 399:

> "But this suit is in admiralty, a branch of the law not hampered by the rigid rules of the common law and which deals with causes upon considerations even more elastic than pertain to the prudent jurisdiction of Courts of Chancery." (Citing cases.)

(b) *Where a lower Tribunal has had the opportunity to see and hear the witnesses testify, that Tribunal's findings on issues of fact depending upon the credibility of witnesses, should not be disturbed.*

The Clermont, (C. C. A. 2) 287 Fed. 136:

> "Where an appeal from a decree in a collision case involved a question of fact only, on which reconciliation of all the evidence was impossible, a finding by an experienced trial judge, after seeing and hearing the witnesses, based on his belief of direct and positive testimony as to the location of one vessel, will not be disturbed."

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The F. B. Squire, (C. C. A. 2) 248 Fed. 469 at 470:

> "When so narrow an issue is presented by such a record, the decision of an experienced trier of facts, who saw and heard the plain men who told their stories in language loose and ungrammatical, to say the least, is not to be set aside, unless certainty of error can be asserted. That we should hesitate to reach the same conclusion from the printed depositions does not, and should not, induce reversal of a finding based on sight and hearing."

The Fulton, (C. C. A. 2) 54 F.(2d) 467:

> "We have so repeatedly said that we would not substitute our judgment, drawn from print alone, that it is not necessary to do more than allude to this doctrine."

In reply, it may be suggested that the District Judge did not see nor hear the witnesses testify. The fact still remains that the Master did and the Court in all respects confirmed his findings.

(c) *Where two lower Tribunals have passed upon questions of fact and have concurred in their findings therein an Appellate Court should accept such findings.*

The Wildcroft, 201 U. S. 378 at 387:

> "This finding of two courts will ordinarily not be disturbed, and is usually accepted by this court as conclusive"

Oelwarke Teutonia v. *Erlanger,* 248 U. S. 521 at 524:

> "It is unnecessary to say more about the evidence than that it shows no ground for departing from the usual rule when two courts have agreed about the facts."

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United States v. *Boston Sand & Gravel Co.*, (C. C. A. 1) 23 F.(2nd) 839:

> "The case was referred to one of the most experienced admiralty lawyers of this bar, who made an exhaustive and elaborate report. This report was, on exceptions by the government, carefully reviewed by the District Judge and affirmed. The case therefore falls under the usual rule that the concurrent results of two tribunals of fact should not be reversed, unless clearly shown to be erroneous."

Here, the reference to the Master was to take proofs and report his findings as to the facts and conclusions as to the law. The Master made findings—the District Court concurred in those findings. The decree entered accords in every respect with such findings. Under such circumstances we respectfully submit that it is not up to this Court to weigh the testimony and determine upon which side the preponderance lies, as appellants in their brief, ask it to do.

In view of the foregoing authorities it would at least appear that the burden is heavy upon appellants to definitely point out, not wherein the preponderance lies but, wherein the findings of the two lower tribunals are clearly and manifestly wrong.

II.

THE LIABILITY OF APPELLEE SOUGHT TO BE ENFORCED HEREIN IS NOT ONE RESTING UPON ITS PERSONAL CONTRACT, AND IS WITHIN THE PROTECTION OF THE LIMITATION STATUTE.

The question here involved is one that was raised for the first time on argument before the District Court. It was not raised in the pleadings; it was not raised before the Master; and it was not made the subject of any one of the numerous objections filed to the Master's report.

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Appellants' answers raised only issues of negligence with the privity and knowledge of appellee. The cause was tried upon those issues not upon the theory of a breach of contract. Thirty-two separate and distinct allegations of negligence were set forth in the answers. In the death cases the right to recover was predicated squarely upon the statute of Illinois giving a right to recovery to the administrator whenever the death of a person shall be caused by wrongful act. The statute was offered and received in evidence. (R. 716.)

The cause having been thus tried, it is now argued:

That the charter of the Eastland was the personal contract of appellee; that there was an implied warranty of seaworthiness; that the Eastland was unseaworthy; that there was, therefore, a breach of the implied warranty, ergo, there can be no limitation.

(a) *To receive consideration, such an issue must rest on the allegations of appellants' answers.*

The right to contest the claim of the owner either to exemption from or limitation of liability, or both, is given by the 53rd Admiralty Rule of the Supreme Court, "provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied."

The answers neither state as a reason for the claiming of liability that there was any breach of any contract nor do they allege such reason for the denial of limitation.

The Master and the District Court were both controlled by the issues raised by the pleadings. Notwithstanding, this theory of a breached contract was not even suggested to the Master. Not one of the eighty-

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six objections to his report was predicated upon such a theory. The same is true of the requests and findings presented to the Master at the conclusion of the hearing before him. However, the question was argued before the District Court.

(b) *The decree must rest not only on the evidence but on the pleadings as well.*

What consideration was given by the District Court to this theory does not appear from the record. Not having been pleaded, and not being raised by the objections to the Master's report it was not presumably before the Court. No decree could have been entered supporting it, for the law is well settled that a Court cannot in entering its decree, consider evidence or theories beyond the confines of the issues raised by the pleadings. If there be such evidence it must be disregarded. This Court has so held.

City of Chicago v. *Goodrich Transit Co.,* 4 F.(2nd) 636, 637:

> "In all legal proceedings the judgment must be in accordance with the allegations and the proofs. The court will disregard all proofs outside the issues, and in pronouncing judgment will be restrained and guided by the allegations in the pleadings. *McKinlay* v. *Morrish,* 62 U. S. 343."

Moreover, the theory finds no support in the evidence. Notwithstanding all of this, it *is* argued to this Court.

Our answer is two-fold. *First,* there was no breach of the contract. The Eastland was in all respects seaworthy. *Second,* assuming a breach. That, of itself, would not give rise to a cause of action in favor of appellants. At most it might give a cause of action to the other party to the contract, the charterer, but the charterer is not party to these proceedings. Its rights under

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the contract, whatever they may be, cannot be here adjudicated.

Reverting back to our first answer for the moment, it is a complete reply to appellants' contention, to say that the Eastland was in all respects seaworthy. There was no breach in this regard. The capsizing of the vessel occurred solely as a result of operating negligence and without the privity and knowledge of the owner. The Master so found and he was affirmed by the Court. We content ourselves with the bare statement here. The questions involved will be discussed in more detail in subsequent portions of this brief.

(c) *An implied warranty of seaworthiness is not to be extended to cover acts of negligence on the part of the crew without the privity or knowledge of the owner.*

Assume that the warranty operates in favor of the passengers with whom we had no privity or contract. In such case it would cover no more than our obligation to furnish a structurally seaworthy ship manned with a competent crew. That duty was fulfilled in every respect. It is not to be extended or construed to cover promises to do acts necessarily performed through the intervention of others. It is not to be extended or construed as warranting that the crew would continue to perform their duties properly.

In *The No. 34* (C. C. A. 2) 25 F.(2nd) 602, at page 607, the Court says:

> "It would seem that 'personal contracts' have thus far been limited to those of the nature of warranties where the obligation was to be performed by the obligor personally and that they have not been extended to promises to do acts necessarily performed through the intervention of others. *The Ice King* (C. C. A.) 261 Fed. 897."

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The facts in *The Ice King* (C. C. A. 2) 261 Fed. 897, make that authority peculiarly applicable to our case. There the Master, contrary to orders, went ashore leaving the tug in charge of the pilot. The pilot was competent and had previously been reliable but on this occasion he became intoxicated, went to sleep at the wheel and allowed the tug to strand.

A tug in charge of an intoxicated master, asleep at the wheel, may in one sense be deemed unseaworthy but the owner had furnished a seaworthy tug in charge of a competent crew. Query: Would the unseaworthiness arising from the misconduct of the master and pilot bar limitation? The Court held that it did not, saying on page 899:

> "Assuming, however, that such an implied warranty does exist in a contract of towage; how far does it extend? Are the owners, having furnished a sufficient and competent crew, with officers duly licensed as required by law, to be held liable for such subsequent arrangements as were made in this case, and for the subsequent intoxication of the pilot while on the trip? To extend such a warranty in this way would go far to nullify the wholesome purposes of the law. We are not willing to do so, in view of the language of the Supreme Court in the latest decision on the subject (*Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 335) * * *."

To the same effect is the decision in *The Soerstad*, 257 Fed. 130, which is a careful analysis of this matter of implied warranty by Judge Learned Hand, one of the most experienced admiralty judges. At page 131, the Court says:

> "Where, however, the promise, as a promise to tow a boat, involves the future conduct of the promisor, the loss is 'done, occasioned, or incurred,' not by the promise and the promisee's reliance upon it,

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> but by the failure to perform the act stipulated; and if that failure results without the knowledge or privity of the promisor, he is entitled to the immunity of the statute. It will so result when he delegates that performance, provided he selects such delegates as the contract permits, and the miscarriage results from their failure. Now the contract here obviously permitted the respondent to select for the towage any master whom he had good reason to suppose capable, and the breach occurred because that master did not do what the respondent promised to do. This breach was not 'done, occasioned, or incurred' with the respondent's privity, and its liability is limited.''

These cases of the *Ice King* and *The Soerstad* were cited by the United States Supreme Court expressly on this matter of implied warranty in *Cullen Fuel Co.* v. *W. E. Hedger,* 290 U. S. 82, which is the case so much relied on by appellants on this point.

In our case the Eastland was seaworthy, properly equipped and in charge of a competent crew. Through the negligence of the crew she capsized. Whether their negligence consisted, as appellants claim, of placing her in an improper berth, wrongful manipulation of the water ballast, or a failure of the master to do that which should have been done, *it was the negligence of the crew and without the privity and knowledge of appellee.*

Notwithstanding a total lack of unseaworthiness in so far as the Eastland herself was concerned; notwithstanding that the disaster was due to operating negligence and notwithstanding a total lack of privity between appellants and appellee, it is argued before this Court that a presumption of unseaworthiness arises from the disaster itself; that that presumptive unseaworthiness constitutes a breach of the charter party and that somehow

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or other appellants succeed to whatever rights under the charter the Indiana Transportation Company may have had.

Support for this theory is claimed to be found in four cases, particularly the case of *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139, in which case proctors contend that the cargo owner was allowed to recover against the owner of the vessel in full and without limitation of liability by reason of a personal contract of the owner with the charterer containing an express warranty of seaworthiness.

No support for this proposition is found in the cases cited. We shall discuss them, first taking the *Luckenbach case.* In that case the cargo owner brought suit *in personam* against the Insular Line, the charterer, and *in rem* against the Steamer Julia Luckenbach, for damages to the cargo carried in the steamer while it was under charter to the Insular Line. The charterer, under Admiralty Rule No. 59, impleaded the owners of the steamer as respondents, claiming indemnification by reason of a warranty in the charter party that the vessel was seaworthy at the beginning of the term and that they would so maintain her. (See 200 Fed. 976.)

The District Court found that the damages were occasioned without the privity or knowledge of the owners and that they were entitled to limit liability against the cargo owner as well as against the charterer who claimed indemnity. The decree was that the owners should pay the shipper's claim to the extent of the value of the ship and that the balance should be paid by the Insular Line (see 235 Fed. 388 wherein the opinion of the District Court is set forth in full).

The owner and the Insular Line appealed. The Circuit Court of Appeals held that the contract of car-

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riage was between the cargo owner and the charterer; that the charter not being a demise, the charterer could not take advantage of limitation of liability; that the cause of the damage being unseaworthiness and not an error of navigation the charter was not protected by the Harter Act; that the exception of unseaworthiness in the bill of lading was unavailing because the charterer had not exercised due diligence in respect to the condition of the steamer.

The Court say (235 Fed. 388, 397):

> "It follows that the libelant is entitled to recover in full against the charterers, unless the clause in the bill of lading as to its insurance protects them. Under prior decisions of this court (citing cases), it does not and we are not disposed to depart from these decisions. * * *
>
> As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter, or of any voyage under the charter. Our decision in *The Benner Line,* 217 Fed. 497, holds that the owner cannot limit his liability against this express contract.
>
> The decree should be modified so as to award the libelant its full damages, payable primarily out of the steamer and the estate of Luckenbach, any deficiency to be paid by the charterer, with interest and costs."

The libelant was therefor permitted to recover by virtue of its contract with the charterer. The charterer had impleaded the owners and was entitled to recover against them by reason of the breach of the charter party, its damages being the amount it was called upon to pay the cargo owner. All parties were before the Court and by virtue of Rule 59 it was not necessary to

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relegate them to separate actions, one against the other, such as would be the case at common law. A short cut was taken and a decree entered against the party ultimately liable, namely, the vessel owner, with the provision that any deficiency was to be paid by the charterer, it being liable under its contract of carriage.

The case went to the Supreme Court. (248 U. S. 139.) Three grounds for reversal were urged. First, that the lower courts both erred in holding that the steamer was unseaworthy and that due diligence to make her seaworthy had not been exercised. The Supreme Court said that the issue was one of fact and it saw no reason to depart from the general rule that concurrent decisions of two lower courts should not be disturbed unless clearly erroneous.

Second, that because the shipper had already been compensated by insurance, the libel should be dismissed. A considerable portion of the Court's opinion is devoted to a discussion of this question, which is not material here.

The third point was that the owner's liability should have been limited, because the District Court found that the unseaworthiness of the Luckenbach was without their privity or knowledge and this finding was not disturbed by the Circuit Court of Appeals. The Court points out that the liability sought to be enforced against the owners was one resting upon their personal contract, namely, their express warranty of seaworthiness and their agreement to "maintain her in a thoroughly efficient state in hull and machinery for and during the service."

The Court then says (248 U. S. 139, 150):

> "This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a

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> demise of the ship. In both, the charterer is without the control over her repair and maintenance. In operations under each the charterer becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners; and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage."

The next of proctors' authorities to be discussed is *Pendleton* v. *Benner Line,* 246 U. S. 353. This involved a libel for cargo damage brought by the charterer (Benner Line) against the owners of the vessel (Pendleton Bros.) upon a charter party of the Schooner Edith Olcott. There was an express undertaking for seaworthiness. The right to recover was predicated upon the fact that the vessel was unseaworthy; that by reason thereof she sank and her cargo was lost.

The District Court found that the vessel was unseaworthy but allowed limitation of liability (210 Fed. 67). Upon appeal the decree was reversed, the Court holding that because of the warranty of seaworthiness the owners could not limit liability (217 Fed. 497).

The Supreme Court granted a writ of certiorari on petition of the owner. The question of seaworthiness was, in the language of the Court, "laid on one side," both lower courts having held that unseaworthiness was present. The Supreme Court states the questions to be, first whether the Benner Line although owning none of the cargo was entitled to sue for the loss to it, and second, the matter of the applicability of the Act of 1884.

On the first point the Court says in substance that the Benner Line was the carrier, that it would have been answerable to cargo owners, or to the insurance

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companies when they became subrogated to the cargo owners' rights, if they had elected to sue. The owners of the vessel had warranted the seaworthiness of the ship to the charterer. The Court says (246 U. S. 353, 355):

> "Wherever in theory of law the technical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrong doers has been stated for centuries to be their liability over."

The litigation was between the owner of the vessel on the one hand and the charterer on the other. The right to recover was predicated on a breach of the contract between them. The charterer was allowed to recover damages for this breach because of its liability over to the cargo owner, as bailee.

On the second question, the Court held that the Act did not limit liability for the personal acts of the owner done with knowledge.

The next authority is *Capitol Transportation Company* v. *Cambria Steel Co.*, 249 U. S. 334.

That case involved a petition for limitation of liability in an action by the owners of the damaged cargo. *There were no other parties involved.* The cargo owner and charterer had the same identity. The right to limitation was denied by the District Court on the ground that the vessel was unseaworthy with the privity and knowledge of the owner (232 Fed. 382, 397) and that the owner had made a contract by which it warranted seaworthiness. The decree of the District Court was affirmed by the Circuit Court of Appeals (244 Fed. 95).

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Certiorari was granted before the *Luckenbach* and *Pendleton cases* had been decided but while they were pending before the Court. The Supreme Court declined to depart from the general rule where two Courts had concurred on a finding of unseaworthiness. Upon the ground that *the owner was privy to the unseaworthiness* and that the contract was a personal contract of the owner, the decree was affirmed.

The next authority is that of *Cullen Fuel Co.* v. *W. E. Hedger,* 290 U. S. 82. In that case a scow chartered to the Hedger Company while lying at a dock careened and cast her load, due to her leaking condition. There was also damage to an adjacent wharf and vessel. Litigation resulted and the owner of the scow filed a petition for limitation. The District Court found that the accident was caused by the leaking condition of the scow and denied limitation *except as to the adjacent wharf and vessel.* (45 F.(2d) 859.)

The Circuit Court of Appeals accepted the finding of the District Court as to the unseaworthiness of the scow. (62 Fed.(2d) 68, 69). The next question in the Circuit Court of Appeals involved the right of the charterer as bailee of the cargo, to recover upon the owner's breach of the implied warranty. The Court held that the charterer was entitled to recover, *predicating such right upon the liability over to the cargo owner;* that this liability is a proper element of damage in a suit against the owner of a vessel upon the latter's covenant of seaworthiness, citing *Pendleton* v. *Benner Line,* 246 U. S. 353.

The Court further held that the owner of the scow was not entitled to limit liability as to cargo because of its personal undertaking as to seaworthiness but would be entitled to limitation as to the claim for dam-

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age to the adjacent property; that this claim sounded in tort and the warranty was not to be extended to cover it. (62 F.(2d) 68, 70.)

The important point to be noted in the consideration of this authority is that the recovery for the breach of the warranty was in favor of a party to the contract, namely, the charterer, and only for the damages flowing from the breach.

The Supreme Court granted certiorari because of the contrariety of opinion which existed in the various circuits as to whether or not the doctrine laid down in the *Pendleton case* applied where the warranty of seaworthiness was implied rather than expressed. (290 U. S. 82.)

The Supreme Court held that an implied warranty was a part of the contract the same as an express warranty.

The Court went no further than that. The doctrine laid down by this case as well as by the other cases discussed is to the effect that an owner cannot limit his liability as against damages flowing from a breach of his personal contract. The action is only in favor of a party to the contract, not in favor of others. Nor does it lie in actions sounding in tort.

These cases do not sustain proctors' proposition. Each of them involve damage to a cargo of merchandise. In each of them there was a warranty of seaworthiness *as well as a breach of that warranty.* Each case involved physical defects. Recovery in each case was had by the charterer, directly in three of them and by virtue of an alternative decree in the *Luckenbach case.*

In the present case the charterer is not a party. It has not seen fit to voluntarily assert a claim for breach of the charter party, assuming that there was such a

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breach. It serves no useful purpose to discuss the question of whether or not it could have been brought in by appellants. It is sufficient to say that they made no attempt to bring it in. Its rights, if any, under this charter party cannot, therefore, be adjudicated in this proceeding.

(d) *Vessel owners have the right to limitation as against passengers, where the injury or death is due to operating negligence.*

Here we have no privity whatever with appellants. We chartered our boat to the Indiana Transportation Company. It was the carrier. It made the contract with the passengers. But even if it be considered from the standpoint of ship and passengers, there is case after case in the books where the ship owner had a direct personal contract with passengers and still was allowed to limit liability under the Statute. *Butler* v. *Boston S. S. Co.*, 130 U. S. 527; *La Bourgogne,* 210 U. S. 95; *The Titanic,* 233 U. S. 718; *The Princess Sophia,* 61 Fed. (2d) 339. The cause of the accident in each case was operating negligence by the captain or engineer, just as in this case. In the *Butler case,* it was fetching up on obstructions. In the *Bourgogne case* it was collision with another ship, incidentally with an owner aboard but not taking part in the navigation. In the *Titanic,* it was hitting an ice berg when improperly running at full speed in the fog; again with one of the owners aboard. In the *Princess Sophia* there was loss of life and personal injury among passengers because of the ship negligently getting on obstructions, which is the claim made here.

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III.

THE FACT THAT THE EASTLAND TIPPED OVER WHILE AT THE DOCK AND BEFORE SHE HAD BROKEN GROUND ON HER VOYAGE PRESENTS NO REASON FOR DENYING LIMITATION OF LIABILITY TO HER OWNER.

(a) *The owner is entitled to limitation notwithstanding the fact that the Eastland was not on a voyage at the time of this accident.*

This proposition was argued at great length before the Master and for that reason, apparently, the Master devoted a considerable portion of his report to this contention.

It was totally abandoned in the arguments before the District Court. It is now revived here in a half-hearted manner.

Before the Master, innumerable authorities construing the Harter Act were cited. Here, appellants rely solely upon the case of *Cullen Fuel Co. Inc.* v. *W. E. Hedger Co., Inc.*, 290 U. S. 82. We have already discussed this case (*supra*, p. 50).

It is not an authority for the proposition that limitation cannot be had when the disaster occurs prior to the breaking of ground for the voyage. The law is directly to the contrary as shown by a long line of decisions.

In *Michigan Steamship Co.*, 133 Fed. 577 (reversed on other grounds 144 Fed. 788), the vessel owner was permitted to limit liability against a claim that arose while she was lying at the dock in process of alteration from a coal to an oil burner, so that she was entirely

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out of commission and utterly unable to be engaged upon a voyage. The first syllabus is as follows:

> "The right of the owner of a vessel to a limitation of liability under the provisions of Revised Statutes Sections 4283-4285 * * * does not depend upon the fact that the vessel is actually engaged upon a voyage at the time of the doing of the act or the happening of the event against which the owner seeks to limit his liability, but the statute applies equally to a vessel at a dock, in her home port, where she is being altered and refitted, and where she has remained for several months."

The C. H. Northam, 181 Fed. 983. In this case a vessel was deliberately hauled up on shore by her owners for the express purpose of dismantling her. The masts and engines had been removed when the claim arose against which she was permitted to limit liability. It certainly cannot be said that a boat lying on the beach with her masts and engines gone and with her owners intending to further dismantle her, was even capable of being engaged on a voyage.

The syllabus is as follows:

> "A steamer, which had been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceeded so far as to render her wholly incapable of being navigated as a tow or otherwise, continued to be a 'vessel' within the meaning of Revised Statutes Section 4289 as amended by act of June 19, 1886 * * *; and her owners may maintain proceedings for a limitation of liability for damage done by her, when she floated and went adrift in a storm without their knowledge."

If it be argued that this boat did, before causing the damage, enter upon a voyage, namely going adrift, then

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the same thing can be said in the case at bar, as the boat did become detached from the dock and did, in a sense, go adrift, before the damage occurred for which claims are made in this case.

The Sunbeam, 195 Fed. 468. In this case it was held that a stone scow which was moored to the bank and which had not carried any cargo for three years, was within the meaning of the limitation of liability acts.

Eastern Steamship Co. v. *Great Lakes Dredge & Dock Co.,* 256 Fed. 497. Here a drillboat which had sunk, was run into while lying sunk. The Court held that the sunken drillboat was a vessel within the meaning of the act and limitation of liability could be granted to her owner notwithstanding she was not at the time upon a voyage, but was lying sunk.

To the same effect is *The Snug Harbor,* 46 F.(2d) 143. In this case, a ship had been sunk a month and had been abandoned as a total loss so that it could in no sense be considered that she was on a voyage, and still it was held that she was subject to the limitation of liability acts.

Patton-Tully Transportation Co. v. *Turner,* 269 Fed. 334. In this case it was held that the limitation of liability acts applied to ships never intended for a voyage. The craft in this particular case was a derrick boat carrying a derrick. She was moored to the bank and used in loading logs from the river bank onto other boats, and never went anywhere except right along the shore in that particular locality. At the time of the particular accident she was moored to the bank and had been for some time and could in no sense be considered on a voyage.

In re Highland Navigation Corporation, 24 F.(2nd) 582, affirmed 29 F.(2nd) 37. This case involved two ships, each of which was lying in a winter berth. They were

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being overhauled, but neither one had done any navigating since the previous fall, nor did either one have any cargo or passengers on board. Certainly by no stretch of the imagination could it be said that either of these vessels was engaged on a voyage, but the limitation of liability statutes were held to apply.

The Muriel, 25 F.(2nd) 505. In this case the ship was lying at the dock after having completed one voyage and there was no further voyage then arranged for. Syllabus 2 is as follows:

> "Limitation of liability statute (Revised Statutes Sections 4283-4285) * * * held to apply to the owner of a pleasure yacht which had completed a voyage, but had not yet completed unloading, when the accident which gave rise to a damage claim occurred."

The South Shore, 29 F.(2nd) 207, affirmed 35 F.(2nd) 110, certiorari denied 281 U. S. 722. In these cases the benefits of the limitation of liability statutes were granted to a vessel which sank at the dock while laid up for the winter and entirely out of commission. In 29 F.(2nd) 207, the syllabus is as follows:

> "Where owners of vessel contracted with city for place to tie up excursion boats for winter, under contract which did not provide for removal of wreckage, and one boat sank and blocked navigation, and owners abandoned vessel, and city had vessel removed at cost of $22,000, owners held entitled to have liability to city limited to value of vessel, under Revised Statutes Secs. 4283 *et seq.*"

Lehigh Valley R. R. Co. v. *Jones,* 50 F.(2nd) 828. In this case this whole subject is very thoroughly considered on a much broader ground than has been urged by the appellants in this case. There is one section of the limitation of liability statutes which applies to the apportionment of whatever might be salved from the ven-

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ture among the various claimants. This particular section of the statutes uses the word "voyage" and it was argued in this *Lehigh Valley case* that inasmuch as this section of the statute itself used the word "voyage" it must have been contemplated that the ship had to be on a voyage. This was most thoroughly discussed by the Court and entirely exploded on the theory that the word "voyage" in this connection was used only in connection with the apportionment of the ship's value or freight pending, at the end of the voyage, and did not mean at all that the ship had to be on a voyage in order to have the benefit of the statutes, because the other parts of the statutes which gave the right to limitation of liability in no sense limited the right to a ship at the time engaged on a voyage. The second syllabus is:

> "Lessee of pump boat held entitled to limit liability for engineer's death, though it was not on voyage at time of accident (46 U. S. C. A. Sections 183, 184)."

The books are replete with authorities where limitation has been granted in cases where an accident occurred prior to the vessel breaking ground on her voyage. We have been unable to find any final decision which holds that limitation is not applicable to damages arising from a disaster which occurs prior to breaking ground on the voyage. We respectfully submit that there is no such authority.

(b) *The distinction between the Harter Act and the Limitation Statutes.*

Proctors for appellants seem unable to distinguish between the Harter Acts and the statutes granting limitation of liability. The one provides for complete exemption from, and the other for partial limitation of,

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liability. Exemption under the Harter Act cannot be had where the disaster occurs before the vessel in question breaks ground for her voyage, but this has no application to the Limitation of Liability Statutes.

The case of *The Colima,* 82 Fed. 665, is clear that an owner may not be entitled to exemption under the Harter Act, but may nevertheless limit his liability under the Limitation Statutes.

The opinion in the *Colima case* is by Judge Addison Brown, one of the foremost admiralty jurists of all time. There was a failure in that case properly to stow the cargo and ballast the ship. The result was that the vessel was unseaworthy when she started on her voyage. Exemption from liability under the Harter Act was denied, but limitation of liability under the Limitation Statutes was granted. The Court said on page 669:

> "To exempt the petitioner from all liability under Section 4283 it must appear that the loss or damage was 'done or incurred without the petitioner's privity or knowledge.' To exempt it under the Harter Act from the claims of cargo owners (27 Stat. 445; 2 Supp. Rev. St. p. 81), it must appear that the ship was seaworthy in fact, or that 'due diligence' was used to make her so."

To the same effect is the very recent case of *Southern Pacific* v. *United States,* (C. C. A. 2) 72 F.(2nd) 212, where the Court says, at page 215:

> "The claimant must prove what he must prove if he were the actor: a definite tort or contract, and the petitioner's connection with it. The petitioner need show no more than that he was not privy to the wrong which the claimant has proved. * * * Personal diligence is not a condition upon limitation, as it is upon immunity under the Harter Act."

One of the clearest expositions of this distinction between the Harter Act and the Limitation of Liability

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Statute is that of *The Galileo,* 54 F.(2nd) 913. There the vessel was rendered unseaworthy because of the negligence of the engineer in causing new bunker coal to be placed upon old coal, which had become heated, so that a fire became inevitable and actually ensued, after the vessel had started on her voyage. She was compelled to put about immediately and return to New York where she subsequently sank as a result of the efforts to extinguish the fire. The unseaworthiness existed at the time she left on her voyage. The Court held that this did not prevent limitation of liability. The unseaworthiness arose not through any fault on the part of the owners but as a result of the negligence of the ship's officer; that you could not read into the Limited Liability Act, the requirement contained in the Harter Act, namely, "or unless such owner or his agents have failed to use due diligence to make the vessel seaworthy."

The Court further said that the language of the Limitation Statute, namely, "without the privity or knowledge of such owner" referred to some personal fault of the owner or his higher representatives and did not exclude limitation merely because of negligence on the part of the ship's officers.

The case went to the Supreme Court by certiorari, where the Circuit Court of Appeals was affirmed. It is reported in the 287 U. S. 420, under the title of *Earle & Stoddart* v. *Ellermans Wilson Line.* In its opinion the Supreme Court clearly points out the distinction between the requirements of the Limited Liability Statute and the Harter Act.

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IV.

THE EASTLAND AT THE TIME OF THE CAPSIZING WAS IN EVERY RESPECT SEAWORTHY.

Appellants, in their answer to the petition, made many and sundry claims of unseaworthiness. All of this was entirely abandoned on the hearing. Not a particle of proof was offered as to any unseaworthiness. No question is raised as to the competency of the crew. Appellee proved a perfectly seaworthy ship.

The Eastland was built by one of the regular shipbuilding companies on the Great Lakes for this precise service out of Chicago across Lake Michigan. She was built under the supervision of the Classification Societies. She was built subject to the inspection of the United States Government officers in charge of such work. She had been regularly inspected and passed by the officers of the United States Steamboat Inspection Service for twelve years prior to the accident and always certified as seaworthy even for a greater quota of passengers by 800 than she had on this occasion. During all of this time she had never had an accident. Appellees bought and operated her during 1914 and up to the time of the disaster in 1915.

Appellee produced as witnesses numerous experienced men, masters and engineers who had previously sailed on her; Government inspectors who had examined her year after year and marine men familiar with construction and navigation. All pronounced her a fine seaworthy ship.

This same question was passed upon by Judge Sessions in the United States District Court at Grand Rapids, where there was testimony from all sorts of men—those who had sailed on the vessel, Government inspect-

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ors, and naval experts. The Court held that she was entirely seaworthy.

There is also the opinion of Judge Carpenter, *in re St. Joseph Chicago Steamship Co.,* 262 Fed. 535, 537. He found that the Eastland capsized for lack of proper ballasting.

Appellants' witness, Flatow, testified (R. 256), that she had "Government license and Government inspections and our equipment and everything right up to the minute what the Government required from us."

Pedersen (R. 208), when asked as to seaworthiness as to her crew, equipment, and otherwise, said: "It was in A-1 shape; everything." Again (R. 227), there was "nothing the matter with her"; she was "all in first class condition, A-1 shape."

(a) *Presumptions cannot be indulged in contrary to established facts.*

We reiterate that no attempt was made by appellants to offer any factual evidence of unseaworthiness; they claim a so-called presumption arose as a matter of law from the fact of the disaster itself. The law is well settled that presumptions cannot be indulged in contrary to proven facts, and on the production of evidence which is contrary to the presumption, the latter vanishes entirely.

This question was discussed by the Circuit Court of Appeals for the 9th Circuit in the *South Coast,* 71 Fed. (2nd) 891. In that case, the South Coast left on a voyage and was never again heard of except as certain portions of her wreckage were later discovered by other vessels. It was contended on the part of the claimants that she was shattered to pieces by the explosion of her boiler. The Court discusses the authorities laying down the doc-

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trine that where a vessel, without reasonable explanation, sinks from an undiscovered cause, a presumption of unseaworthiness arises where nothing but unseaworthiness can explain the accident. The evidence showed among other things that the vessel had been inspected and the owner had sought to conform to the requirements of the United States inspectors. There was testimony of fog, of treacherous currents and dangerous reefs. The Court says:

> "In this case the evidence shows that there were adverse conditions of weather, of current and dangerous reefs, and there is no evidence how the vessel was being handled. Indeed, appellants' assumption that an explosion occurred might involve another equally plausible assumption that some one was negligent, and that the vessel was not 'being properly handled.' However, it is not necessary to indulge in a presumption here, as we think that the evidence sustains the finding of the District Court that: * * * 'When the said vessel left the port of Crescent City, California, on the 16th of September, 1930, bound for Coos Bay she was in all respects staunch, strong, tight and seaworthy, and properly and efficiently handled, officered, manned, equipped, stowed and fitted for the voyage.' "

See also: *Nelson* v. *Stutz Chicago Factory Branch,* 341 Ill. 387. *Osborne* v. *Osborne,* 325 Ill. 229. *Woodward* v. *Chicago M. & St. P. Ry. Co.,* 145 Fed. 577, 580.

The undisputed facts establish seaworthiness of the Eastland. In the face of this no presumption could arise from the mere happening itself unless it be the presumption that something was wrong.

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(b) *A presumption of unseaworthiness arises only when nothing but unseaworthiness can explain the accident.*

The cause of this accident might have been one of any number of things. Appellants, themselves, have insisted that it was due to two entirely different causes; one, improper berth; two, wrongful manipulation of water ballast.

There not only could not be a presumption of unseaworthiness under such circumstances as a matter of fact, but there could be no such presumption as a matter of law. In *The Carroll,* 60 Fed.(2nd) 985, at page 990, the Court says:

> "* * * in a proceeding of this kind, presumptions of unseaworthiness only arise when the vessel sinks from unknown causes, under such circumstances that nothing but unseaworthiness can explain the accident;"

and in *The Transit,* 250 Fed. 71, the Court says on page 72:

> "Nor do we think there is substance in the libelant's claim to recovery on the presumption of the vessel's unseaworthiness. Such a presumption necessarily arises and alone will sustain a recovery in a case where a vessel sinks from an unknown cause under circumstances where she had been subjected to no external peril, and where nothing but her unseaworthiness can explain the accident. In other words, the presumption of unseaworthiness arises where the only inference in the circumstances is that of unseaworthiness. *The Loyal,* 204 Fed. 930, 123 C. C. A. 252; *The Wille,* (D. C.) 134 Fed. 759; *Sanbern* v. *Wright & Cobb Lighterage Co.,* (D. C.) 171 Fed. 449; *Id.,* 179 Fed. 1021, 102 C. C. A. 666; *Oregon Round Lumber Co.* v. *Portland & Asiatic S. S. Co.,* (D. C.) 162 Fed. 912; *Forbes* v. *Merchants Exp. &*

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> *Transp. Co.*, (D. C.) 111 Fed. 796; *Id.*, 120 Fed. 1019, 56 C. C. A. 681. As the circumstances attending the sinking of the 'Transit' do not exclude all inferable causes except that of unseaworthiness but on the contrary, very plausibly suggest another cause, the presumption does not exist."

The authorities cited by proctors in support of this so-called presumption of unseaworthiness, with one exception, involve cases where the vessel was leaking and either sank or capsized because of that fact. The exception we refer to is *The Southwark,* 191 U. S. 1. That was a Harter Act case and it goes no further than to hold that the burden of proof to show due diligence, is not substantiated by evidence of a superficial examination where the testimony shows that the refrigerator plant failed to function shortly after sailing.

In every other case cited by proctors, the disaster arose as a result of a leak and the vessel filled with water.

The Eastland capsized. No one has ever contended that this was due to a leak or caused by water getting through her hull.

(c) *There is a distinction between structural unseaworthiness with the privity and knowledge of the owner, and negligent operation or mismanagement on the part of the crew, without owner's privity and knowledge.*

If any presumption arises from this fact of capsizing, it is that she was not properly handled. The very fact supports the theory of improper manipulation of her ballast tanks.

Appellants refer the Court to a request in which the Master was asked to find that the ballast tanks were improperly handled and that the water therein was not

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properly distributed so as to give her stability and that she was seaworthy in every respect when properly handled. (Brief 20.) They point out that the Master and the Court found in accordance with this request. Therefore, they argue, it necessarily follows, that the Eastland was unseaworthy.

Appellants' difficulty lies in their inability to distinguish between structural unseaworthiness in the hull or equipment to which an owner might be privy, or of which he might have knowledge, and so-called unseaworthiness caused by mismanagement on the part of the crew.

The distinction is very clearly illustrated in the case of *The Ice King,* 261 Fed. 897. That case has been previously discussed (*supra,* p. 43).

Perhaps a better illustration of the distinction is found in the case of *The Galileo,* 54 F.(2nd) 913. In that case, as the Court will perhaps remember, it was held that because of the engineer's negligence in placing new coal over old coal that was heated, there existed at the commencement of the voyage such a condition of danger that a bunker fire was inevitable. The vessel was held unseaworthy, but it was further held that the unseaworthiness, being caused by the negligence of the boat's officers and without the privity and knowledge of the owner, would not prevent the owner from claiming exoneration from liability under the Fire Statute. (Sec. 182, Title 46, U. S. Code.)

The Supreme Court granted certiorari. Their opinion is reported in 287 U. S. 420, under the title of *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.* It was there conceded that the phrase in the Fire Statute "negligence of such owner" meant the personal negligence of the owner and that the negligence of the ship's officers would not deprive the owner of the statutory immunity.

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The contention was made, however, that the Statute did not confer immunity where the fire resulted from unseaworthiness existing at the commencement of the voyage and discoverable by the exercise of ordinary care. (p. 425).

The Court held that the Statute made no other exception from the immunity granted excepting that the fire be not caused by the design or negligence of the owner and that the duty to exercise reasonable diligence to discover such matters before the vessel embarked on her voyage was not to be read into the Act.

The condition attached to the right to limitation of liability is that the cause of the damage against which limitation is sought must have been done, occasioned or incurred "without the privity, or knowledge of such owner or owners." (Sec. 183, Title 46, U. S. Code.) That is the *only* condition attached to the right. See also: *The South Coast,* (C. C. A. 9) 71 F.(2nd) 891, 894.

(d) *Corporations, as well as individuals, are entitled to limitation against damage arising from conditions to which they are not privy and of which they have no knowledge.*

If it be conceded, then, for the purpose of argument, that from the mere fact of her capsizing, the Eastland is presumed to be unseaworthy, we still have the question as to whether the unseaworthiness was with the privity and knowledge of appellee. To answer that question it must first be determined in what respect she was unseaworthy. Until we know of what the unseaworthiness consisted, it is impossible to determine whether or not this unknown defect was with the privity and knowledge of the owner.

Standard Wholesale P. & A. Works v. *Chesapeake L. & T. Co.,* 16 F.(2nd) 765 at 766, lays down the doctrine that

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corporations, like others, are entitled to limitation against damages arising from conditions to which they are not privy, and of which they have no knowledge—"that is, defects not apparent to a casual observer, but only appreciable to a skilled artisan—and they are charged with knowledge of the existence of latent defects, or become privy to acts of negligence only when persons representing it in such capacity as authorizes them to speak for the company are guilty of some negligence or omission to maintain the vessel in seaworthy condition."

In *Wessel, Duval & Co.* v. *Charleston L. & T. Co.*, 25 F.(2nd) 126, at page 130, the Court says:

> "In the instant case, upon a careful examination of the record, I am constrained to find that any defects in the lighter which caused her to sink were not apparent to the 'casual observer,' and were not apparent, even after a good deal of examination and inspection; that those in charge of her inspection used the care of reasonably prudent persons, and that the unseaworthiness of the lighter was without the privity or knowledge of the owner of the lighter. I think, therefore, the petitioner is entitled to limit its liability to the agreed value of the lighter."

This same question was most thoroughly gone into, in the *South Coast,* (C. C. A. 9) 71 F.(2nd) 891, 894-895. The concluding paragraph of the opinion succinctly states the point we are making, (p. 895):

> "If unseaworthiness caused the loss of the South Coast, it yet must be held that such unseaworthiness was without the privity or knowledge of the owners."

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(e) *Appellants must establish a causal relation between the fault of appellee and the disaster.*

Bronx Barge Corp. v. *Connelly Transportation Co.*, 35 F.(2nd) 294, Syl. 4:

> "Under Rev. St., Sec. 4283 (46 U. S. C. A., Sec. 183) owner of the tug held entitled to claim benefit of limitation of liability for damage to barge during storm, where master was not only negligent in selection of route on first leg of journey, of which owner had knowledge, but master was also negligent in failing to heed weather signals and in failing to make Delaware breakwater while there was time to do so, of which owner had no knowledge, since the latter rather than the former was the proximate cause of the disaster."

The El Sol, 45 F.(2nd) 852 at 855:

> "To preclude limitation on the ground of privity or knowledge it is not, in my opinion, sufficient merely to prove that there was a failure in equipment, inspection or personnel, to which the ship owner was privy or of which he had knowledge. It must be shown that the fault in equipment, inspection or personnel actually contributed to the accident in respect of which the shipowner seeks limitation."

The Cullen No. 32, 45 F.(2nd) 859 at 863:

> "We have thus the privity of the owner of the Cullen No. 32 with the cause of the disaster—the causal connection between the damage and the owner's personal fault which I think is necessary to preclude limitation of liability."

In the case of *The Carroll,* 60 F.(2nd) 985, 990, the owner did not establish the seaworthiness of the barge. The Court held that even in such a case the claimants must prove a causal connection between the unseaworthiness and the sinking.

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The latest and most terse statement of the doctrine is found in *Southern Pacific Co.* v. *United States,* (C. C. A. 2) 72 F.(2nd) 212, on page 215, where the Court says:

> "The claimant must prove what he must prove if he were the actor; a definite tort or contract, and the petitioner's connection with it. The petitioner need show no more than that he was not privy to the wrong which the claimant has proved."

(f) *A presumption cannot be predicated upon another presumption.*

If we concede the presumption of unseaworthiness and further that it has not been rebutted by the factual evidence, appellants are still far short of their ultimate goal. There is yet the question of causation. To meet that, appellants must ignore the evidence with reference to the ballast tanks; their contentions regarding the improper berth and indulge in another presumption, namely, that the Eastland capsized because of this presumed unseaworthiness. Without factual evidence to support it, such a presumption must be founded on the prior presumption. Even so, the case is not yet complete. We still have to meet the question of privity and knowledge.

Not a witness, including appellants' own, have any knowledge of defects in the Eastland or her equipment. The same is true as to the competency of her crew. Quite to the contrary, appellee proved a perfectly seaworthy ship, as the witnesses all affirmatively testified that she was A-1 in every respect. To arrive anywhere we must then ignore all of this testimony and indulge in another presumption, namely, that the presumed unseaworthiness was with the privity or knowledge of appellee. This presumption must be indulged without the slightest information as to what it was that the owners were privy with and had knowledge of. To get this far we have

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had to ignore substantially every bit of factual evidence in the record with the one exception, namely, that the Eastland did capsize. Upon that one fact we have pyramided three inferences until we have a structure such as Judge Learned Hand in *Southern Pacific Co.* v. *United States,* 72 F.(2nd) 212, on page 215, termed a "house of cards."

This pyramiding of inferences, one upon another, is a thing not sanctioned by law. *Looney* v. *Metropolitan R. R. Co.,* 200 U. S. 480; *Manning* v. *Insurance Company,* 100 U. S. 693.

V.

THE CAUSE OF THE DISASTER IS FULLY EXPLAINED BY THE FINDINGS. THE EASTLAND WAS IN ALL RESPECTS SEAWORTHY AND THEREFORE THERE IS NOTHING TO EXPLAIN WITH RESPECT TO ALLEGED UNSEAWORTHINESS. (This is answering Appellants' Brief, Subhead IV.)

Appellants complain that the Master, as well as the Court, found "her port tanks were filled and her starboard tanks practically empty." (Brief, p. 23.) We submit that neither the Master nor the Court so found. The Master, in his report, does state that Lynn testified that he was present at an investigation made after the vessel was raised and that that investigation showed that the tanks toward the dock had hardly any water and there was plenty in the opposite tanks. (R. 495.) His finding is "and I shall find, as requested by respondents, that petitioner was guilty of negligence in the operation of the ballast tanks on said steamer and that such negligence caused the said steamer to tip over on said date, and that at the time of the capsizing of said steamer there was not a proper amount of water in her ballast tanks, and that what water was in said tanks was not

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properly distributed therein for the safety of said steamer and her passengers." (R. 821.)

The finding of the Court was "that the said capsizing of the said Steamer Eastland was caused by the negligence of the engineer of said steamer in charge of the operation of her ballast tanks in improperly handling said water ballast." (R. 884.)

Appellants further complain that there is no evidence whatsoever that this condition of the ballast tanks existed at the time the steamer capsized. (Brief 23.) Lynn testified that it existed at the time of an investigation made when the vessel was raised. Bangs testified that he was the first one into her engine room after she was raised; that he got down there just as soon as he could (R. 176), and he found the valves leading to Nos. 2 and 3 starboard tanks open, indicating that at the time of the disaster they were attempting to put water in those tanks. These facts are not disputed.

(a) *Appellants having asked the Master to make a finding and the Master having made the finding as requested, are estopped from complaining of the same.*

Appellants do not present to this Court the entire picture with reference to the requests for findings. For some reason or other they fail to mention that among the fifty requests for special findings which they submitted to the Master, were the following (R. 766):

> "31. That on July 24th, 1915, petitioner was guilty of negligence in operating the ballast tanks on said steamer, and such negligence caused or proximately contributed to cause said steamer to tip over on said date.
>
> 32. That on July 24th, 1915, there was not a proper amount of water in the ballast tanks of said steamer and what water there was in said tanks was

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> not properly distributed therein for the safety of the passengers who were on said steamer when it tipped over on said date."

They fail to call the Court's attention to the fact that the Master's finding was "as requested by respondents," (appellants) and that the finding corresponds in every detail with the above quoted requests (R. 821), as does the Court's finding. (R. 884.)

We submit that apellants, having requested this finding, which was fully supported by the testimony, are now estopped from complaining of the same. *Davis* v. *Wakelee,* 156 U. S. 680; *Gering* v. *Leyda,* 186 Fed. 110, 113; *Jefferson Standard Life Insurance* v. *Wilson,* (C. C. A. 5) 260 Fed. 593, 595.

Notwithstanding, appellants question this finding and misstate the record with reference to the evidence in an effort to discredit it; they very naively set forth in their brief excerpts from the testimony from Captain Pedersen (Brief 23 to 25), concluding with the following:

> "A. I know he was filling them because they were pretty near full; in order to correct the port list, he had to put water in her starboard; but she did not respond."

They point out that there was no objection to the question eliciting this answer and no motion to strike out the answer and "there is no testimony to the contrary." (Brief 25.)

They overlook entirely the fact that the physical operation of these ballast tanks was controlled entirely by the engineer (Our Brief, p. 5), and that this was so at all times (R. 360) and was so on the morning of July 24th (R. 362); that at that time the master did not know of his own knowledge what the engineer was doing with reference to the filling of the ballast tanks; he had no means

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of ascertaining that fact from his position on the bridge (R. 363); that it might be that the tanks were not properly filled but that he did not know (R. 364).

Whether or not they have overlooked this testimony, they do not call the Court's attention to it. In the face of that testimony how could the Master or the Court below give any credence to Pedersen's statement that the tanks were pretty near full? This Court could not well disturb the findings of these two tribunals on such a statement when the person who made it admits that he did not know the facts.

It seems pertinent to ask, if the tanks were pretty near full, what was it that suggested to Pedersen that some newspapers or other rubbish might have plugged the intake? (R. 351.) That was the idea that occurred to him "right on the bridge. Just a few seconds before she turned over; I was wondering if that could have been the case." (R. 364.)

(b) *The issues involved are:* (1) *Is there any liability at all, and;* (2) *Is appellee entitled to limit that liability? On the first, the burden was on appellants. Negligence once established the burden shifted to appellee to show that it was without its privity and knowledge.*

Appellants' difficulty in this respect does not rest entirely on misconceptions of the record. They also misconstrue and do not understand the issues involved in this proceeding and the burden devolving on them with respect to such issues. The issues raised by the pleadings are two in number: *first,* is there any liability at all, and as to this they must establish negligence; and, *second,* if there be liability, is the appellee entitled to limit that liability to what is left of the venture, according to the stat-

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ute, or is it to be denied that right because of its privity and knowledge in the cause of the disaster?

The burden of proof was upon appellants to establish negligence. That involved the question of what caused the Eastland to tip over. If due to unseaworthiness, appellants must establish that fact. If due to improper manipulation of the ballast tanks the burden was still theirs. If due to an improper berth, the situation is exactly the same. Negligence once being established, the burden was then on appellee to prove that such negligence was without its privity and knowledge.

We have cited some of the recent decisions on these points on page 29 of this brief. They fully sustain our position in this respect.

The burden of proof as to liability never shifts. It is always on the claimant. It is not affected in this case by the fact that subsequently to the reference to the Master on November 28, 1928, appellants made no move whatever in their case and that in order to get somewhere with the litigation, appellee proceeded to take testimony before the Master.

See: *Southern Pacific* v. *United States,* 72 F.(2nd) 212, 215.

With these considerations before the Court we shall proceed to discuss the contentions of appellants as to the cause of the disaster. The suggested causes from appellants' brief are three in number.

1. Presumptive unseaworthiness,

2. Improper berth, and

3. Improper manipulation or handling of the ballast tanks.

We feel that we have said about all that is necessary on unseaworthiness, presumptive or otherwise. There is

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no evidence whatsoever that the Eastland was defective or of what the claimed unseaworthiness consisted. There is nothing but inference. Upon that must be built another inference; viz., that this unknown factor contributed to the capsizing rather than the other causes suggested by appellants. Upon this must be pyramided another presumption; namely, that the unknown factor was with the privity and within the knowledge of appellee.

We shall now discuss the other two suggested causes in their reverse order and attempt to point out that the evidence fully warrants and supports the finding of the Master, which finding was confirmed by the District Court.

Very little needs to be added to what we have already said on the subject of improper ballast as the cause.

We have noted Lynn's testimony that the port tanks had plenty of water and the starboard tanks very little and that there were very few passengers (R. 483) on her starboard side. We know too that the tanks had been pumped out the previous evening (R. 344).

We have referred to the testimony of Bangs, the first one in the engine room after the boat was raised. He found the valves leading to two of the starboard tanks open, indicating an attempt, at the time of the capsizing, to put water therein.

We know that the steamer had taken a list to starboard and straightened up. Pedersen says that this could only have been accomplished by running water into the port tanks (R. 364). There was water, therefore, in the port tanks. We have already mentioned that when Pedersen saw the boat list to port he began to wonder what the engineer was doing and the thought occurred to him that some refuse might have blocked the intake. From this we know that his real thought at the last minute was that

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she was not being ballasted properly. Add to all of this the following allegations of appellants' verified answer (R. 11).

> "7th. It was negligent in improperly operating, controlling and managing the ballast tanks, apparatus, and appliances which were provided on said steamer."
>
> "8th. It was negligent in allowing a large number of passengers to board said steamer and in moving and attempting to move said steamer with its ballast tanks partly or wholly unfilled with water."

Supplement this with appellants' requests for finding already referred to, *supra* (p. 10) and we submit that there can be no just complaint of the Master's or the Court's finding.

There remains only the other suggested cause; namely, an improper berth. It is to be borne in mind that this dock was not some isolated or unused dock in some out-of-the-way or other unusual place. On the contrary, it was on the Chicago River in the very heart of the city, which locality has been teeming with ships and shipping since Chicago has been a port. This particular dock, it is definitely shown, has always been used for passenger boat purposes as well as otherwise. The record bespeaks no other accident or any trouble about shoal water or obstructions at this dock although boats were constantly using it.

The dock was owned by the city and was leased by the season to the Chicago & South Haven Steamship Company. It used it regularly for the landing of the City of South Haven and the Petoskey. According to Lynn (R. 513), the South Haven drew more water than the Eastland. Flatow testified to the contrary (R. 660). The Master, who saw and heard both witnesses, evidently be-

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lieved Lynn, who was corroborated by other facts and circumstances.

Lynn testified that the dock was considered by him, as assistant harbor master, as a safe dock for passenger boats of the size of the Eastland and the City of South Haven. He also considered it a safe dock for the Neptune, drawing over eighteen feet, when he placed her in that berth on the day the Eastland was taken away (R. 513). That was a duty of his department—to see that all of the docks along the river were maintained in a safe condition.

Pedersen (R. 369, 378) stated very definitely that he knew of nothing wrong with the dock previously to the disaster; that if he had any reason to suspect that it was unsafe for the Eastland he would not have taken her there despite orders to the contrary from anybody.

Flatow, upon whose testimony the entire fabric and structure of this foul berth theory is built, says very positively that he had no knowledge whatsoever of anything wrong previously to the disaster (R. 270) and that he had, in fact used the dock for a great many years previously to 1914 for the landing of passenger boats. (R. 275-277).

(c) *The master of the Eastland was entitled to rely upon the good reputation of the dock at which the Eastland berthed.*

In *The Marlborough,* 47 Fed. 667 at 672, the Court says:

> "The charge of improper docking does not seem to find any support in the evidence. The vessel was ordered in where she went by the superintendent of docks and was therefore fully justified in believing that she could safely lie there. The obstructions against which she chafed were hidden several feet

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below the water's surface. She cannot be held to the duty of inquiring for such sources of danger. To so hold would clearly be unreasonable; and, without inquiry, she could not discover them."

The Gildersleeve No. 339 (C. C. A. 2), 68 F.(2nd) 845, 847.

"We cannot think it negligent to place a barge in a slip constantly frequented by many other barges without inquiring whether its waters contain hidden dangers."

In *Aetna Insurance Co.* v. *Davidson Steamship Co.*, 257 Fed. 68, at page 69, this Court says:

"Though a wharfinger is not a guarantor of safety he must use reasonable diligence to ascertain the condition of the berths into which he invites vessels, and the navigator has the right to assume that such care has been exercised."

In *M. & J. Tracy, Inc.* v. *Marks, Lissberger & Son, Inc.*, 283 Fed. 100 at page 102, the Court says:

"But a consignee who, knows that a berth has a good reputation, that it has been used for years without complaint or known accident, is entitled to transact his business on that reputation."

See also:

Slater Fireproof Storage Co. v. *Nicholson Transit Co.* (C. C. A. 7) 47 F.(2nd) 734.

Sparks Milling Co. v. *United States*, 5 F. Supp. 567.

(d) *He was also entitled to rely on Government charts.*

Pedersen says that he had charts in his room (R. 367); that these charts showed eighteen feet of water. If there was any shoal water or any obstructions in this vicinity

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they would have been marked on the chart. A navigator is entitled to rely on such charts.

The Nathan Hale (C. C. A. 2) 99 Fed. 460 at 462.

> "Navigators are ordinarily justified in relying upon the charts provided for their information by the government, and ought not to be deemed negligent in doing so, in the absence of circumstances known, or which ought to be known, discrediting the accuracy of the charts. Negligence ought not to be imputed to the tug on this occasion merely because she did not go exactly in the middle of the channel."

(e) *Local harbor tugs are charged with a knowledge of the draft of water and all obstructions in their home port.*

Actions speak louder than words. Here, two harbor tugs took the Eastland into this berth (R. 216) before the accident, and one was lying there with a line on her at the time of the accident. The law is fixed that local harbor tugs must know the draft of water and all obstructions in their home ports. This Court said in *Vessel Owners' Towing Co.* v. *Wilson,* 63 Fed. 626 at page 630.

> "Engaging in the service of towing up and down the Chicago River, the tug was bound to know the channel, and whether, under the circumstances, it was safe to make the venture of passing the draw. (Citing the Margaret, 94 U. S. 494). And that obligation imposes upon the master of the tug, before undertaking the tow, a knowledge of the condition of the bottom and of the depth of the water in the river, and of the existence and location of any well-known obstruction."

And again, in *Great Lakes Towing Co.* v. *Alva Steamship Co.,* 261 Fed. 261 at 262, this Court after citing authorities, says:

> "From these and other cases the rule is deducible that a master of a tug, undertaking the tow of a

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> vessel in a home port, is bound to know the proper and accustomed waterways and channels, the depth of water, and natural formation of the bottom, whether in its natural state or as changed by permanent excavation, and he is chargeable with notice of the recently changed conditions, either in channels or harbors, if means of knowledge exist and are available to him."

These three tugs charged with knowledge would, undoubtedly, know this locality. There was not a word about obstructions from either, although charged with the responsibility of putting this boat into this particular berth. It is inconceivable that they would have put her there if there had been any such obstructions. They must have considered it a safe berth.

Both the harbor master and the assistant harbor master, the latter, at least, an experienced navigator, were there at the dock at the time in the performance of their duties. They were charged with a duty with reference to the safety of this particular dock. They said nothing because they knew nothing of any obstructions. It cannot be claimed that a non-resident owner could have any such knowledge. In fact there were no obstructions.

Pedersen, after being recalled by appellants, attempted to support the theory of a foul berth perhaps in an effort to divert any charge that he was in any way negligent in operating the Eastland. His testimony amounts to no more than his opinion that she was on something. That opinion was arrived at at Grand Rapids after he saw the spile which had been sawed off and taken there for evidence. He then, apparently, connected the spile with the mark that he says he saw on the Eastland's bottom after the disaster.

Flatow testifies as to obstructions in the bed of the river at this dock. The obstructions that he tells about

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must all have been on the starboard side of the Eastland as she lay there that morning.

The actions of the Eastland which resulted in her capsizing have an important bearing upon the cause of the disaster, particularly the fact that she first listed toward the dock and then recovered and came back to an even keel before taking the list which resulted in her capsizing. All the witnesses who testified on this subject, including Flatow, are agreed that she was free and afloat in the water at that time. The record supports the statement that she was fully loaded when she took that list and recovered therefrom (R. 724-726), although there is some apparent conflict.

Pedersen testified, on being recalled, that when she took this list she was about half loaded and that when she started on her starboard list, which ended in her capsizing, she was about three-fourths loaded although in his previous testimony he seemed to indicate that the loading had been completed prior to any listing of the steamer.

Flatow attempts to corroborate this. It is undisputed that when she capsized she had her full quota of twenty-five hundred passengers. Flatow says that it took about thirty minutes to load the boat. At another time he said thirty to thirty-five minutes. (R. 233.) A mathematical computation would indicate that when she was half loaded fifteen minutes of this time had expired. Further computation would indicate that when she was about three-fourths loaded from twenty-two and one-half to twenty-three minutes would have expired and that it would take from seven to seven and one-half minutes to complete the loading.

This is all *very* interesting in the light of Flatow's previous testimony. He says that when there were 2,475 people on the boat the inspectors called a halt, stating

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that were was that many people on the boat; that they were coming pretty lively and you can load only twenty-five more; twenty-five people more were loaded, one by one; then a cashier came down and asked to be allowed on the boat. The inspectors said that she could be provided some one else was put off, because the steamer then had her capacity. The master was on the bridge. He ordered the gangway drawn up. Flatow said, "All right, captain." The master said, "Yes," * * * "get me the bridge." Flatow started to go and tell Woeckler, the then harbor master, that they were ready for the bridge. He got about amidships of the boat, that is, half way, when "*I see she started to take a list,* and Captain Pedersen was standing up on the bridge, and he looked over, and said, 'For God's sake open up your gangway.' I ran back. *By the time I got back there, the boat was over.*" (R. 244-245.)

This is Flatow's testimony on his first of five appearances as a witness for appellants. In the face of that testimony, proctors have the temerity to state that the list which resulted in her capsizing took place when she was about three-fourths loaded; a list which in a very short period of time carried her over onto her side in the waters of the Chicago River; that while she was going over to her doom, which process, according to the undisputed testimony, required but a very short period of time, over 600 passengers were loaded onto the boat through a single gangway, the gang plank drawn in and her gangways placed in position. The suggestion is incredible.

The two police officers, Fischer and Lescher, both testified positively in regard to the listing. Fischer, (R. 722) testifies with reference to the port list and says that at the time she took that list her gangways were closed.

Lescher (R. 724) testified that he saw the Eastland take a list first toward the building; that she straightened

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up, and then listed out to the river and that at the time of the first list the gangways were closed and no passengers were boarding the boat as far as he knows. (R. 726.)

Lynn testified that the steamer had a slight list in toward the dock at the time he arrived there some six or seven minutes previously to the time when the loading was completed and that this list existed (R. 518) at the time she was loaded and her gangway placed in position.

Flatow is the only witness, if we except O'Neil, who testified to obstructions. His testimony is based upon alleged soundings from the Clark street bridge to the LaSalle street tunnel and from the dock to the outer part of the channel. From these soundings he was of the opinion that the boat was on a piling aft, on concrete debris amidships and in the mud forward.

First, as to the piling. There was only one. (R. 245.) Its location was verified. Measurements were taken of the distance from that piling to the dock. It was about eighteen inches across and its top was some seven feet or more beneath the surface of the water. The piling was cut off and taken to Grand Rapids in the case before Judge Sessions. (R. 246.)

Flatow gives us no idea as to the location of this piling in the bed of the river excepting that it was around about the after gangway. (R. 273.) The only information as to the location of this piling is found in the testimony of Lynn. He says it was east of the east line of LaSalle street; had been pulled out from beneath the dock; that there were no piles driven out in the river; he located this pile with a pike pole. It was a dock pile and was afterwards sawed off. (R. 507-508.)

The next obstruction testified to by Flatow is the concrete, amidships. He says that it "seemed" that one of the buildings had torn down a fire wall and had thrown

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the concrete, as they thought, under the dock, and as the sheet piling broke this concrete slipped out in to the river. (R. 246.) It extended straight out from the dock for about eight or nine feet; that was his guess. (R. 259.)

That leaves the bow and as to this he says that there was only six and one-half to seven feet of water up at the Clark street end. The testimony is that the Eastland, as she lay at the dock that morning, had her stern whipped in close; her after gangway against the cluster of piles, leaving about four feet of water between her side and the dock proper at that point, and her bow out into the river some twenty-one to twenty-two feet. (R. 486-487.)

The Eastland had a beam of thirty-eight feet. She was 265 feet long. She had fine lines and her hull was sharply "V" shaped, sloping in from a beam of thirty-eight feet at her widest part to almost absolute zero at her keel. Flatow's opinion that the vessel rested on a spile is at most a mere speculation. It is not shown how the vessel could have impinged upon a spile, the location of which is not specified excepting that it was some seven feet below the surface of the water and according to Lynn had been pulled out from the dock line. Flatow does not dispute Lynn's testimony in this respect. In fact, he distinctly says that he does not remember the location of the spile and later on he says that the pilings were in several places. (R. 259.) At any rate a boat drawing thirteen or fourteen feet of water could not get on top of a spile, the top of which was only seven feet under the surface.

It is perhaps a reasonable inference that the distaster itself may have been the cause of this misplaced pile rather than that it caused the disaster.

Then, there is the concrete. According to Flatow, it extended out only some eight or nine feet. He does not

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tell us the depth of the water over it. It was in the river because of the sheet piling on the dock having given away. Assuming that the concrete was there before the disaster, it is difficult to imagine how the Eastland with a sharp hull, a beam of thirty-eight feet, four feet away from the dock line proper at her after gangway and necessarily still further away amidships, could have rested her keel upon this concrete. If she had been fetched right into the dock, her keel must have been at least nineteen feet away. Add to that the actual distance that she was away from the dock and the thing is physically impossible.

This leaves the mud at the bow. The testimony is that her bow was twenty-one to twenty-two feet out from the dock and again Flatow does not tell how close to the dock this six and one-half to seven feet of water that he speaks of was, nor how far out you had to go for greater depth. Lynn very definitely tells us the depth of the water at the various places along the dock and at stated points out from the dock, and that her bow was well outside of any shoal water.

It is claimed that this theory finds support in Flatow's testimony that "the water was a couple of feet lower" than it "usually" was at said dock and that there is no dispute as to this testimony. (Brief, p. 33.) Pedersen disputes it, for he says that the water was a little low, about eight inches (R. 229-230). Flatow, himself, is not quite so sure as to the two feet because at another time he says that it was about one and one-half to two feet below normal (R. 259).

Flatow's opinion, it is naively stated, was based upon his navigation of the Eastland. We submit that an opinion based upon an experience the witness never had is worth little. The record reference in justification of this

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statement is page 248. From that page we quote as follows:

"Q. From your experience as a—from navigating the boat did you form an opinion as to the cause of the boat tipping over?

A. I did, immediately.

Mr. Branand: I object to his opinion.

The Special Commissioner: He was a clerical man. He was not an navigating officer.

The Witness: I was on the boats all the time, sailing with them and working with them.

The Special Commissioner: Even so.

Mr. Branand: You did not have any experience in navigating the boat?

A. Not as far as navigating the boat, no, I did not."

After Flatow had attempted to place the steamer on the obstructions forward and aft as well as amidships and apparently failed, it seems as though something more was needed—something bigger and better in the way of obstructions—something of such proportions that the Eastland could not by any chance escape it and to accomplish this, appellants produced witness O'Neill. He testified that a three-story brick building located at the southeast corner of LaSalle street and the river collapsed and the north or back end and approximately half its length on the side fell into the river; that the amount of the debris that went into the river was approximately ten to twenty thousand brick; that this occurred about six months or a year before the disaster. (R. 423-428.)

This witness, on the day that the Eastland capsized, was on his way to his office. He usually arrived there in the neighborhood of 9:00 o'clock and would have arrived that morning about the usual time excepting for

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the fact of the disaster and the delay that ensued. (R. 439-441.)

He was upon the Northwestern elevated road on a south bound train and the train was stopped on the elevated structure over the river, about one hundred and fifty yards from the Eastland. (R. 428.) He saw her tip over. According to him, the disaster occurred at about 9:00 o'clock (R. 439.) It had to occur at that time for him to see it. He was not at all discouraged by the fact that everybody else agreed that it happened around 7:30. A possible explanation might lie in the fact that this witness, for some reason or other, left for his office at an unusual hour on that day, but he says not. (R. 451.) In any event, he claims to have seen the disaster and he says that he watched the Eastland sinking deeper and deeper into the water as she loaded her passengers until she came to rest on this pile of brick that was deposited in the river some six months to a year before and then she tipped over. (R. 442-445.) All of this from an elevated train that would have no occasion to stop there, at any rate, until after the accident had happened.

Previously to O'Neill's testimony, we had that of Flatow. Subsequently to the disaster, Flatow had divers working at the scene for several weeks and he tells us of various and sundry obstructions that were found. (Appellants' Brief pp. 26-27.) Strangely enough, Flatow makes no mention of any pile of bricks of the size that ten to twenty thousand of these articles would create. There is not even a suggestion of bricks.

More discouraging to appellants than this, however, were the photographs (R. 749) which show the building intact. We refer to Petitioner's Exhibits 1 and 2 of November 29, 1933. These exhibits call for an explanation and Flatow is relied on to give it. He was again re-

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called and testified that the corner of the building that caved in had been repaired previously to July of ..... (R. 659). On cross examination he testified that he did not know when the building caved in but he saw that the entire northwest corner had collapsed and fallen into the river; there was a big hole in the wall and the bricks were sliding down under the dock. He first could not say how large the hole was but finally stated that it was big enough for his examiner to walk into, which would be about six feet. It ran back a little into the side wall going south; that the building was constructed of brick, subsequently the damage was repaired; he could not say when. He felt pretty sure that the brick fell into the river in 1914, sometime about June or maybe July (R. 671-675). He saw the repairs being made but does not know what they were made with. He supposes they filled the hole with bricks; believes that he would recognize a picture of the building if he saw it and upon being shown Petitioner's Exhibit 1 of March 31, 1933, identifies it as a photograph of the building that he had been talking about and says that it looks very familiar (R. 677-680). We submit that an examination of this photograph (R. 752) clearly discloses the building to be of frame construction.

The net result as far as Flatow is concerned is that Libelant's Exhibit 1 of March 31, 1933, did not support the story that O'Neill had told and that he attempted to corroborate. He, thereupon, placed the hole in this building in the foundation and beneath the dock and testified that the damage had been repaired and to that end it was necessary to tear up the dock to get at it. Previously to recalling Flatow, proctors for appellants attempted to have Captain Pedersen testify with reference to this building but Pedersen said that he did not know of anything wrong with the building. (R. 456.)

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Lynn says that his soundings in the vicinity of this building disclosed a soft mud bottom the same as everywhere else, and that there was no evidence of any bricks at all. It is indeed strange that with all the investigation that was had following the disaster by all the different agencies, as the testimony shows, that no one should discover this enormous heap of brick. The only logical conclusion to be drawn from the testimony and the circumstances in the record, is that the building never did cave in. The photograph alone, showing an old frame building, is proof that the story is wholly an invention.

This dock was being used regularly to land passenger boats. Not only that but we have the Neptune in there drawing over eighteen feet. Proctors in their brief (p. 30) state that appellants offered in evidence photographs which showed this building in an apparently dangerous condition and which they say were taken several years before the disaster. In order that the Court may understand just exactly what they mean by "several years before the accident" we point out that the photographs were taken in 1910 (R. 742) and that the Master refused to receive them because the conditions disclosed were too remote.

The investigation after the accident, as testified to by Lynn, would seem to dispose conclusively of the theory of foul berth as a cause of the disaster. He says the Eastland's loaded draft was nine feet four inches forward and thirteen feet four inches aft. He had observed it many times. He noticed it that day. (R. 491-492.) Pedersen says the draft was between thirteen feet six inches and fourteen feet (R. 228).

Lynn says that there was no water found less than twelve feet four inches except at the last couple of stations next to the bridge and there the water was not

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less than nine or ten feet. This was all within four feet off the dock. Outside of this, that is to say, outside the four foot mark it dropped off rapidly and nothing less than seventeen feet ten inches was found. The Eastland was lying in about twenty-two feet after she rolled over. (R. 490-491.)

As a result Lynn changed the opinion he had previously held that the Eastland was on the bottom. His reaction then was that she was not on the bottom. The basis for this later opinion was the position in which the boat lay at the dock embarking passengers; her movement afterwards; her stern swinging out from the dock into the stream; the list that she had and the condition of her tanks as disclosed by the investigation, drawing nine feet four inches forward and thirteen feet four inches aft, it was impossible for her bottom to touch at the dock where they found twelve feet; she was nowheres near that. She was farther out from the dock than that (R. 494-496).

Placing the Neptune in the same berth confirmed the impossibility that the Eastland could have been aground (R. 542).

There are no inconsistencies in the testimony of this witness as appellants would have this Court believe. He admitted that at the time of the disaster he was of the opinion that the boat was on the bottom. He did so testify before the coroner's jury, but then he had no facts. After the Eastland was taken away he changed that opinion (R. 540). There is nothing inconsistent in this. The statement is made that Lynn testified before the coroner's jury as to the depths of the water existent in the Eastland's berth (Brief p. 28). This is a misstatement of the record for, as Lynn states (R. 531) these facts were ascertained afterwards. The depths given

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are the results of soundings made after he testified at the coroner's inquest. The particular depths referred to on page 28 of appellants' brief are soundings close to the dock and all within a distance of four feet out.

Next but not least important is the fact that after the vessel had been fully loaded she listed toward the dock, recovered and came back to an even keel. To a man versed in marine matters this demonstrates that she could not have been on the bottom or any obstruction for the following reasons:

(*a*) Every part of her, from her keel to her bilge on the inside or dock side, was going deeper in the water as she listed toward the dock. She was not, therefore, and could not have been resting on anything on her inside when she was listing toward the dock.

(*b*) Neither could her keel have been resting on anything because we know her top sides were against piling in front of the dock, and so her keel would have to be afloat and move out some toward the middle of the stream as she listed down toward the dock, or otherwise she would have leaned against the dock and stayed there.

(*c*) As soon as she started to recover from the list toward the dock, she would immediately relieve herself of anything she might have rested on from her keel to her inside bilge, because then her bottom from her keel to her inside bilge would be constantly rising in the water and the opposite side going down and her keel moving in toward the dock so that as she thus righted herself she must have been relieving herself of anything that she might have been on inside and her keel must have been afloat because if it were not, once she listed down toward the dock she could not come back if her keel were on anything, and the very fact that she did come back shows that her keel must have been afloat as it would have to move in toward the dock to let her recover from her list, and list outboard.

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(*d*) As soon as she was up on an even keel again she must have been 5 or 6 inches clear of anything that she might have been touching when listed toward the dock, and it is inconceivable that any obstruction could follow her up and shove her over, there just could not have been any obstruction on her inside which could by any chance have had anything to do with her capsizing.

All of the witnesses in this case who would know about such things testified to the correctness of this and even Flatow was forced to agree. (R. 274.)

Herriman, head of the American Bureau of Shipping for the Great Lakes and a naval architect who superintended the construction of the Eastland, explains this (R. 562-564).

We have, perhaps, spent more time on this question of the dock than it merits, for after all, the question of the cause as between the dock and the improper manipulation of the ballast tanks is rather academic. In either case we contend that the alleged negligence was without the privity and knowledge of appellee. However appellants' discussion opened up the question to such an extent and was so largely predicated upon misconception of the record that we felt constrained to treat it with some detail. We submit that there is no substantial basis in the record to sustain such a theory.

(f) *The theory of an improper berth as a proximate cause of the disaster rests upon conjecture. The record fails to establish it.*

In the *Onward,* 6 F. Supp. 45, upon a somewhat similar state of facts, the Court held the evidence insufficient to establish liability for damage to a barge from submerged piles.

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See also the *L. D. Potter,* 34 A. M. C. 646, 647, where the Court says:

> "The mere fact that the tug sank while in a berth maintained by the government is not sufficient; there must be affirmative proof that the tug sank as the result of her coming in contact with some obstruction or dangerous condition of the bed of the slip between piers 30 and 32, and that the respondent negligently allowed it to exist, and there must be proof that the hull of the L. D. Potter was breached as a result of coming in contact with some outside obstruction, and that the respondent knew, or should have known, of the presence of such obstruction."

The last cited case is an opinion by the District Court for the Eastern District of New York. It is not yet reported in the official reporter.

VI.

THE CAPSIZING OF THE EASTLAND WAS WITHOUT THE PRIVITY OR KNOWLEDGE OF APPELLEE. (Under this heading we propose to discuss the arguments advanced in Sections V and VI of appellants' brief.)

To that end, a brief discussion of the legal principles applicable may be helpful.

(a) *The material words of the statute are "without the privity, or knowledge of such owner."*

The Limited Liability Statutes provide as follows:

> "The liability of the owner of any vessel * * * for any * * * loss, damage * * * done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." (Title 46, Sec. 183, U. S. C. A.)

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The material thing is the language "without the privity, or knowledge of such owner or owners."

(b) *The rule of construction to be applied is that of liberality.*

The rule of construction to be applied is one that will effectuate rather than defeat the purpose of the statutes. The statute is to be construed liberally in favor of the vessel owner. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578 at 588-589.

> "In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

Recently the Supreme Court reiterated this view in *Evansville and Bowling Green Packet Co.* v. *Chero Cola Co.*, 271 U. S. 19, pages 21-22.

> "The rule of limited liability of owners of vessels is an ancient one. It has been administered in the courts of admiralty in Europe from time immemorial, and by statute applied in England for nearly two centuries. See *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 593; *The Maine*

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v. *Williams,* 152 U. S. 122, 127. Our statutes establishing the rule were enacted to promote the building of ships, to encourage the business of navigation, and in that respect to put this country on the same footing with other countries. See *Moore* v. *American Transportation Co.,* 24 How. 1, 39; *Norwich Co.* v. *Wright,* 13 Wall. 104, 121. The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests."

Two very recent pronouncements of this uniform interpretation of the statute are *Lehigh Valley R. R. Co.* v. *Jones,* (C. C. A. 3) 50 F.(2d) 828 at 829, and *Petition of Wheeler, et al.,* 51 F.(2nd) 374.

(c) *Privity and knowledge of the owner means personal participation by the owner.*

The Indrapura, 171 Fed. 929 at 938.

"There must be personal participation in the act of delinquency or omission leading to the loss."

The Pere Marquette No. 18, 203 Fed. 127 at 131:

"The rule is of utmost importance to the petitioner, because the 'privity or knowledge' which will defeat it means the personal fault of the owner or officers, and not that of agents or servants which, in other situations may be imputed so as to create liability."

The Oneida (C. C. A. 2) 282 Fed. 238 at 241.

"Under the Act of Congress he (the owner) is only chargeable for his willful and negligent acts, and the negligence of those in charge of the navigation of the vessel, to which he was not privy and of which he had no knowledge, will not be imputed to him. *The Republic,* 61 Fed. 109, 9 C. C. A. 386; *The Tommy,* 151 Fed. 570, 81 C. C. A. 50; *The Alola* (D. C.) 228 Fed. 1006."

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> The knowledge or privity that excludes the operation of the statute must be in a measure actual, and not merely constructive. It must be actual in the sense of knowledge or authorization, or immediate control of the wrong acts or conditions, or through some kind of personal participation."

The 84-H, (C. C. A. 2) 296 Fed. 427 at 431.

> "The privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered. There must be some fault or negligence on his part in which he in some way participates."

These same principles were applied in the very recent case of *The Princess Sophia,* 61 F.(2nd) 339, which was a passenger carrying ship and where limitation was allowed as against claims for the death of passengers.

The El Sol, 45 F.(2nd) 852 at 855.

> "I find that the steering gear of the Sac City was in good condition when she sailed on the morning of the collision, but, if I am wrong, I further find that the adjustments needed, if any, were matters of steamship operation by her personnel and that her owner did not know and was not in privity with any defects therein."

In *The Yungay,* 58 F.(2nd) 352, the owner delegated the duty of adjusting the compass to the master. The master failed to adjust the compass properly and disaster resulted. The Court held that this duty could be delegated; that the condition of the compasses was without the participation of the owner. Limitation was allowed.

In *The Admiral Fiske,* 41 F.(2nd) 718, the master failed to maintain safe and sufficient deck watches at sea. This was contrary to owner's instructions and with-

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out its knowledge. Held that owner was entitled to limitation. The Court says, page 720:

> "By virtue of his office and the rules of maritime law, it is the master's duty to select and station his crew. *Butler* v. *Steamship Co.,* 130 U. S. 527, 9 S. Ct. 612, 32 L. Ed. 1017; *The George W. Roby* (C. C. A.) 111 F. 601."

(d) *In the case of a corporate owner the privity or knowledge must be that of a managing officer.*

In *Craig* v. *Continental Insurance Co.,* 141 U. S. 638, at 646; where the Court says:

> "When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation."

(e) *The master alone was in charge of the navigation of the Eastland.*

The navigation of a vessel must necessarily be left to her master. An absentee owner cannot determine these matters, assuming that he has any knowledge whatsoever concerning them. Matters of ballast, depth of water and the like are questions of navigation. Such matters were necessarily left entirely to Captain Pedersen. Any negligence on his part cannot be imputed to appellee unless it personally participated in the same. See *The North Star,* 3 F.(2nd) 1010, where the Court says on page 1011:

> "The navigation of a vessel at sea is under the absolute control of her master. He has to hold a government license for fitness, and his powers and duties are to a large extent regulated by law. He is responsible for the proper navigation of the vessel. See *The Styria,* 186 U. S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027, for a strong statement of the master's position and duties, and Judge Hale's discussion of them in *The Kronprinzessin Cecile* (D. C.)

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228 F. 946, 957. *I doubt whether an owner on the bridge would have any right to give an order against the master's; there cannot be two captains on the same vessel.*" (Italics ours.)

Also the *Princess Sophia,* (C. C. A. 9) 61 Fed.(2nd) 339, which involved the loss of the vessel and cargo and of the lives of all the passengers and crew. The Court says on page 350:

> "The responsibility of navigating the ship and selecting and directing the crew rests upon the captain. In the *Butler Case, supra,* at page 554 of 130 U. S., 9 S. Ct. 612, 618, the Supreme Court said: 'By virtue of his office' and the rules of maritime law, the captain or master has charge of the ship and of the selection and employment of the crew. * * *. See, also, *American Hawaiian S. S. Co.* v. *Pacific S. S. Co.,* (C. C. A. 9) *supra,* at page 720 of 41 F.(2nd), and *The Lusitania* (D. C.) 251 Fed. 715, 728.
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> * * *
>
> As was well said by Judge Mayer, in *The Lusitania, supra,* at page 728 of 251 Fed.: 'The fundamental principle in navigating a merchantman, whether in times of peace or of war, is that the commanding officer must be left free to exercise his own judgment. Safe navigation denies the proposition that the judgment and sound discretion of the captain of a vessel must be confined in a mental straight-jacket.' "

The principle is based on ordinary common sense. If an owner, who need not necessarily have any knowledge of navigation or matters pertaining thereto, is to be allowed to interfere in these matters, he then becomes the navigator. The result would be a complete nuulification of the federal statutes with reference to the qualification and licensing of navigators.

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No one gave, or attempted to give Pedersen any orders in such matters. He says that he was the responsible party and would not have accepted any orders with reference to matters pertaining to navigation.

The first attempt to impute negligence directly to appellee lies in the claim that Mr. Hull was personally guilty of negligence when he instructed Captain Pedersen to report to Mr. Greenebaum on the morning of the excursion; that he should dock the steamer at whatever dock Mr. Greenebaum should *then* designate; that it was to leave as the first boat and return for its regular trip at 2:00 o'clock. (Brief p. 35.)

Proctors again misconceive the record. Hull's orders (R. 750) were not as they state. They are all contained in Respondent's Exhibit 1 of January 9, 1933. He issued no orders to Pedersen other than that letter. Pedersen says that he received no others. (R. 630.) Pedersen did not construe these orders as proctors do. They were not intended to be so construed. Hull did not contemplate that Pedersen would navigate the Eastland up and down the Chicago river on the morning of the excursion looking for Mr. Greenebaum and the dock at which to embark Greenebaum's passengers. The thought is most absurd. Pedersen understood (R. 221, 342) that Hull contemplated his seeing Mr. Greenebaum before the morning of the excursion. So did Flatow.

Flatow told Pedersen that he had better go and see Greenebaum and Pedersen did so. He first said he went on Thursday, later he changed it to Friday, but he did go and see Greenebaum and he knew, at least the night before the excursion, the dock at which he was to land. He went in there some time between midnight and 1:00 o'clock previously to embarking his passengers at about 6:30. There was, therefore, ample time to make any investigation that Pedersen thought necessary.

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Proctors misstate the record when they say that Mr. Hull's orders were to load 2,500 people. Hull issued no such orders. The owner was to receive a flat price of $500 for the excursion. It made no difference to the owner whether the steamer carried her capacity or not. It was, undoubtedly, contemplated by Greenebaum that she would carry her capacity. She was certified by the United States Government to carry that number. Placing that many people aboard did not, therefore, constitute negligence.

Neither was it negligence to stipulate that the Eastland was to be the first boat out of Chicago in order that she might make her regular trip. Such an agreement contained no element of negligence. Orders to Pedersen to carry out that agreement would not constitute negligence. We adopt the illustration used by the District Court in his discussion of the case. He stated that every railroad engineer and conductor is given a schedule and expected to maintain it but that does not mean that the engineer or conductor is to disregard all dangers, such for instance, as an open switch.

(f) *The law does not require that vessel owners shall have knowledge of the building, upkeep, management or navigation of ships. Neither does it require that the owner shall place an intermediary between itself and the master who shall possess such knowledge.*

The law permits an owner to discharge its duties with reference to the matters stated in the above head note by the employment of persons possessing the requisite technical knowledge and skill. The law further provides that only men examined and licensed by the government as being qualified to act either as master or engineer

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shall have charge of the vessel. The duty imposed upon the owner is fulfilled when it places its vessel in the hands of a licensed master and a licensed engineer and any dereliction upon the part of these officers cannot be imputed to the owner in the absence of any privity on its part with, or knowledge of the negligence.

The law is well stated in *Quinlan* v. *Pew,* (C. C. A. 1), 56 Fed. 111, where the Court on page 118, says:

> "We are also constrained to the belief that this statute, which the supreme court directs shall be interpreted broadly, has regard for the usual necessities of the occupations of life, and in that respect intends that owners may avail themselves of the proper facilities common to business men, and be relieved, so far as it is concerned, whenever and so far as they have appointed a suitable representative, be he master, consignee, or other agent, to supervise the ship, either at sea or at the home port, or otherwise, and either for fitting her away, or navigating her after she is so fitted away. The law, for the purpose of this case, cannot make a distinction between the owner who has but one vessel and time and opportunity to give it his personal attention, and the owner who has many vessels, or whose necessities call him long distances from his residence, or whose infirmities, sickness, inexperience, or sex renders him or her incapable of attention to affairs of this nature."

Further support is found in *Boston Marine Ins. Co.* v. *Metropolitan Redwood Co.,* (C. C. A. 9) 197 Fed. 703 at 709:

> "But we cannot concede that an owner of a vessel in order to be entitled to limit his liability under the statutes, must, before sending his vessel on her way, acquaint himself with the science of navigation, or acquire expert knowledge concerning his vessel, its equipment, its machinery, or the necessary crew therefor, or must place between himself and

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> the master an intermediary who shall possess such knowledge, and our attention has been directed to no authority which so holds."

and also:

> *The Annie Faxon,* (C. C. A. 9) 75 Fed. 312, 315.
>
> "When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded of the inspector of a boiler. It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concern injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert."

It was not necessary that Hull know the berth at which the Eastland was to dock. He had provided a competent master and engineer. That fulfilled his duty. He rightfully assumed that her navigator would not attempt to take her into any dock where she would be at all likely to encounter danger. It is not the law that an owner must acquaint himself with the draft of water or the possible obstructions that might exist in all the ports or at all the docks to which his vessels may go. The selection of a proper berth is a part of the navigation of a ship.

The real fact is there was nothing wrong with the dock. It was in constant use. There was nothing to put anyone on notice of any obstructions or defects. In any event, the owner of the Eastland was not there. If there was a duty to ascertain the depth of water, the sufficiency of that depth for the Eastland's draft and pos-

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sible obstructions, it was the duty of the captain. Assuming such a duty, it arose in connection with the navigation of the vessel. Any dereliction in that respect was not with the privity or knowledge of appellee. It would not bar limitation.

(g) *A local passenger agent, even if Flatow were such, is not a managing agent of a corporate owner within the meaning of the Limitation Statute.*

All that we have said on this question with reference to Hull applies with like force to Flatow, assuming, contrary to the fact, that he was a managing officer within the contemplation of the statute. Flatow had no knowledge of anything wrong with this dock prior to the disaster. He so stated. (R. 270.) In any event, he was not such an employee whose knowledge on the subject would be that of the owner.

Proctors, on page 39 of their brief, set forth their suggestions why Flatow *was* a managing officer of appellee. The substance is merely that Flatow was to have full charge of the passenger and other business of appellee out of Chicago; that he did all of the work in Chicago with reference to excursions, and was the only man employed in Chicago for that purpose.

It is not contended that Flatow had jurisdiction of any kind over the Eastland with reference to her navigation. It is not contended that he had any authority over her master nor any authority as to the selection of the dock at which she embarked passengers. Hull specifically testified that Flatow did not have such authority; that Flatow's duty was to solicit excursions. (R. 582. Flatow had no authority even to charter the boat. Charter parties were referred to the main office (R. 587).

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Appellants' own witness, Conley (R. 609) says that Flatow's duties were to contact lodges, societies, and other organizations, with a view of obtaining charters for excursions. (R. 612.)

Hull says that Flatow was not an officer of the company, a director, or a stockholder, and had no authority as general manager. (R. 582.) Flatow concedes this, except that he says he was a stockholder.

Pedersen says that Flatow never at any time instructed him with reference to the navigation of the steamer or the use of her ballast tanks. (R. 367.) He took orders from nobody with reference to navigation. He was the sole navigator and Flatow had nothing to do with it except to tell him when the passengers were on and give him the high-sign when to go. (R. 372-373.)

Flatow's own conception of his duties as they concerned the charter party in question was to see that the boat got to the dock provided by Greenebaum, and that the help was there to take care of the passengers. (R. 241.) As to his duties generally, he was not an officer, but a hired man (R. 260). He says Pedersen was in charge of the boat (R. 242); that he, Flatow, had had no experience in navigating the same (R. 248). He was merely the agent who negotiated the sale of these services with people who wished to give excursions. (R. 349.) When he stated that he had full charge of the Steamer Eastland he did not mean her navigation; he was talking about the business end. Her navigation was solely in charge of her master, Pedersen (R. 324), and any orders that he gave in so far as the Eastland was concerned were simply with reference to the business operations (R. 325). He had occasionally held the boat to accommodate passengers, but Pedersen was the master and in sole charge (R. 326). *The question of whether*

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there was sufficient water at the dock, he left entirely to the master; he, Flatow, knew nothing of such matters (R. 335).

This is the testimony of appellants' own witness. They produced him and they are bound by his testimony. It falls far short of establishing the contention that he was a managing officer. It conclusively establishes the fact that he had nothing whatsoever to do with the Eastland in anything that concerned her navigation.

The case of *The Linseed King*, 285 U. S. 502, has no application whatsoever to the facts in this case. In that case one Stover, a plant manager, had been charged with the duty of determining when and under what conditions the Linseed King was to operate. The Linseed King was a gasoline launch, approximately forty-five feet in length and ten feet beam, used by the petitioning company for the purpose of carrying employees across the river. On the day of the disaster the boat crossed the river safely, and a number of persons boarded her. On the return trip she proceeded at full speed and struck a cake of ice, which stove a hole in her bow, causing her to fill and sink, and a large number of persons lost their lives. She was admittedly unfit to run through ice, which fact was known to the owners' executive officers, and they had instructed Stover, the works manager and representative of the company in charge of the Edgewater plant, that the boat should never be run through the ice and that as soon as the ice showed itself in the river she was to be laid up for the winter. He was also directed that whenever there was a likelihood of the presence of ice all trips were to be made only in broad daylight and even these were to be discontinued when ice definitely appeared. In the language of the Court (page 510):

> "The decision as to when the ferry should be withdrawn for the winter rested with him."

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In the case before the Court Flatow was absolutely without any authority with reference to the Eastland's operation. On that there is no dispute. He was a mere hired man, the same as was the master but without his technical knowledge. Further, he had no privity with, nor any knowledge of anything wrong with either dock or water ballast. In so far as the record goes he had no knowledge even as to what means were used to ballast the Steamer Eastland.

Any negligence either as to the dock or ballast concerned purely operating matters chargeable to the officers of the ship and not to Flatow. Negligence in these matters is the very thing against which the statute is designed to afford relief. See *The Oneida,* 282 Fed. 238 at 241.

In no event could Flatow rise above the dignity of a local passenger agent and in *The Princess Sophia,* (C. C. A. 9) 61 Fed.(2nd) 339, a "local freight and passenger agent held not 'managing agent' of a corporate ship owner within limitation of liability statute." (Syl. 17.)

VII.

THERE WERE NO ERRORS IN THE REJECTION OF EVIDENCE BY THE COURT.

It is contended that the Court erred in refusing to admit proper evidence. A brief argument in support of this is set forth on page 41 of appellants' brief. The substance is that appellants offered to prove that both Flatow and Pedersen observed conditions of danger while the steamer was embarking her passengers; that neither of them stopped the loading of the steamer because they had orders from Mr. Hull to put 2,500 people on the steamer and get it away as the first boat so that

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it could return for another trip at 2:00 o'clock on the afternoon of the same day.

We have already pointed out that Mr. Hull did not give any orders to load 2,500 people on this steamer (R. 750); it made no difference to him what number she carried, so long as she did not exceed her lawful quota. His orders to get her away not later than 8:15, and return in time to make the regular trip at 2:00 o'clock did not, in any sense, contemplate that the master was to disregard apparent conditions of danger.

Aside from that, the proposition is based entirely on a misconception of the testimony. Both Pedersen and Flatow testified flatly that neither of them had observed or known of anything wrong with this dock prior to the disaster. Flatow, who was appellant's own witness, very distinctly said that he left the question of sufficient depth of water entirely to the master; that he knew nothing about such matters; he was not a navigating man; he had no experience in navigating this boat nor, as far as the record shows, any other boat; he made no claim to being a navigator.

Whatever orders Mr. Hull issued he knew he was giving to a competent navigator; a navigator who had furnished references to him and about whom inquiries had been made, a navigator who was licensed by the United States Government as fit to have charge of a steamship; and whose papers entitled him to take such a vessel any place in the world. A man familiar with the harbor of Chicago, who had taken this ship in and out of Chicago for two seasons. He assumed, and rightfully so, that any orders that he gave would be carried out at all times with a distinct regard for the safety, not only of the passengers, but of the steamer itself. The profit to be made on this charter was not so great as to jus-

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tify a total disregard for the safety of the steamer—not to speak of her passengers. As was said by Judge Learned Hand in *Southern Pacific Co.* v. *United States,* 72 F.(2nd) 212, 215, "It is difficult to be serious in discussing such phantoms."

Furthermore Flatow was called and recalled by appellants on five different occasions, and Pedersen several times; every time proctors thought they wanted something new. There must be an end sometime to recalling witnesses to establish a basis for every new thought that occurs to proctors.

VIII.

APPELLEE ALLEGED AND PROVED FACTS ENTITLING IT TO LIMITATION OF ITS LIABILITY.

Appellants refer to and apparently concede the allegetion of appellee's petition to the effect that at the time the Eastland began to embark her passengers she was stout, staunch and strong, fully equipped and manned by a competent crew in every respect seaworthy. Whether this fact be conceded or not, the record completely establishes it. But they say, appellee does not allege that this condition existed at the time she capsized.

They fail to recognize that on the embarkation of her passengers she had then entered on the performance of her charter. She was at that time perfectly seaworthy. If we assume unseaworthiness at the time of capsizing, it was, of necessity, something that occurred during the time that she was embarking her passengers; something, therefore, necessarily without the privity and knowledge of the owner who was not there. The only suggestions offered by appellants put the matter squarely within this

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category of mismanagement or negligent operation on the part of the crew.

Appellants earnestly contend that the Eastland capsized because she attempted to embark her passengers at a berth that was foul with obstructions. They do not contend that her capsizing resulted in any degree whatsoever from lack of structural seaworthiness, improper equipment, or because any of her crew was incompetent and known to be such before the disaster. Such being the case, it seems inconsistent that they should attempt to argue to this Court that there was any breach of an implied warranty of seaworthiness. The claimed breach, the thing that occurred, if appellants be correct, was brought about, not by the negligence of the owner, but by the very negligence of the charterer itself in designating an improper berth.

IX.

APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL AND THE COURT DID NOT ERR IN DENYING THEIR REQUEST THEREFOR.

(a) *There is no constitutional right to a jury trial in the admiralty jurisdiction.* *Crowell* v. *Benson,* 285 U. S. 22 at 45; *Waring* v. *Clark,* 5 How. 441 at 459.

(b) *The right to a jury trial must be predicated on the Statute of 1845.*

Appellants' right to a jury trial, if they have any, is necessarily based on the statute of 1845 set forth in their brief on page 44.

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(c) *One purpose of Limitation Statutes is to avoid multiplicity of suits.*

This is a proceeding for limitation of liability according to the statute in such case made and provided. The Supreme Court has formulated rules and set down the procedure governing such proceedings. No jury trial is provided for. A jury trial is entirely contrary to the purposes of the statute and the Supreme Court rules. One of those purposes is to avoid a multiplicity of suits.

In *Butler* v. *Boston S. S. Co.,* 130 U. S. 527, which is a very instructive case analyzing the purposes of the limitation statutes, the Court said on page 552:

> "The beneficent object of the law, in enabling the shipowner to bring all parties into concourse who have claims arising out of the disaster or loss, and thus to prevent a multiplicity of actions, and to adjust the liability to the value of the ship and freight, has been commented on in several cases that have come before this court, notably in the case of *Norwich Co.* v. *Wright,* 13 Wall. 104 and *Providence & New York S. S. Co.* v. *Hill Man'fg. Co.,* 109 U. S. 578."

Chief Justice Taft reiterates this in *Hartford Accident Co.* v. *Southern Pacific,* 273 U. S. 207 at 215:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. *Dowdell* v. *United States District Judge,* 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill

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in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner; the limitation extending to the owner's property as well as to his person. *The City of Norwich,* 118 U. S. 468, 503."

(d) *The jurisdiction of the Federal Court in matters concerning limitation of liability, where there is more than one claimant is exclusive.*

In the recent case of *Langnes* v. *Green,* 282 U. S. 531, suit was started in the state court and when coming on for trial limitation of liability proceedings were started in the District Court. The question arose as to which court should proceed. In light of the fact that there could be only one claimant, the Supreme Court ruled that both courts should retain jurisdiction; that he should be allowed to proceed in the state court with a jury trial, but only on admitting the right to limit liability; the moment more than one claimant appeared or the right to limit liability was questioned, the case would have to go back to the United States Court under the limitation proceedings, as it then had exclusive jurisdiction. The Court said at page 539:

"That the petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there was a plurality of claims or only one, is equally clear. *White* v. *Island Transportation Co., supra,* p. 351. The situation, then, is that one statute gave respondent the right to a common law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek a limitation of liability in the federal District Court. Needless to say that if the cause for a limitation of liability assumes such a form that only a federal court is competent to afford

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> relief, the jurisdiction of that court is exclusive, and must be exerted to dispose of the entire case; and the action in the state court may not be further prosecuted."

Here there were hundreds of suits filed by death claimants, by personal injury claimants, by property salvors, and by life salvors. Most of them were filed in this court; some in the state court. Further, claimants prosecuting these cases, do deny the right to limitation of liability. If they should admit the right to limit, the fund is already exhausted, there is nothing for them to recover and the jury cases would, therefore, become moot. If they were permitted to proceed before juries, therefore, they would have to deny the right to limit liability, and immediately they raised the issue of the right to limit liability they would have to come back into the District Court as that court has exclusive jurisdiction of such issue.

As was said in *Langnes* v. *Green, supra,* p. 541, the case was permitted to proceed in the state court because there was only one claim, the Federal Court however

> "retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible (but since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty."

The same question was up in *The Mistral,* 50 F.(2nd) 957, which was a limitation proceeding in which claimants came in and asked to be permitted to proceed in the state court. The Court said at page 958:

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> "Quoting again from *Langnes* v. *Green, supra:* 'Needless to say that, if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive'."

To the same effect is *The Lake Ellendale,* 53 F.(2nd) 415.

(e) *A jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up.*

Appellants' proposition that they have the express right to a jury trial has been squarely passed on, not only in these foregoing cases but by the Supreme Court of the United States. *In re East River Company,* 266 U. S. 355. In that case seamen were killed and injured in the sinking of a ship. They brought action in the state court under the Jones Act. (Title 46, Sec. 688, U. S. Code). The owner filed limitation for liability in the District Court and injunction was issued. The claimants in the state court contended that the Jones Act being an Act of Congress giving them a right to trial by jury, overrode the provisions of the Limitation of Liability Statutes which, by bringing the cases into the District Court, prohibited trial by jury. Questions were certified to the Supreme Court and there the court in effect held that the Limitation Statutes overruled the express provisions in the Jones Act in reference to jury trial and the matter should go forward in the District Court.

The Court said page 368:

> "The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of principles not as a basis for meticulous discovery of conflict with an established system in matters of detail. The choice of a jury trial is given when things

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> take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up * * * we have no doubt that the injunction may issue and that the statute regarding limitation of liability of shipowners has not been repealed so far as claims like the present are concerned."

This case has been followed in *The Victoria,* 3 F.(2nd) 330, in a case between a ship and her passengers, where the Court said at page 331:

> "If the petitioner has a right to limit liability, it is the duty of this court to adjudicate the rights between the parties and not shirk responsibility by permitting claims for damages to be litigated in the state court. *In re East River Company,* the Supreme Court, on December 8, 1924, said:
>
> 'The choice of a jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up'."

Here the ship was given up, there is a multiplicity of suits, and the right to limitation of liability is denied by claimants, so that it is a matter to be governed entirely by the rules of procedure laid down by the Supreme Court of the United States for the conduct of Limitation of Liability suits.

(f) *The Statute of 1845 has been strictly construed.*

The statute of 1845 was passed for the purpose of extending the admiralty jurisdiction to the Great Lakes, but because of the sacrosanct view then prevailing as to jury trial, reserved the right under the specified circumstances to jury trial. Before that the admiralty jurisdiction was thought to extend only to waters in which the tide ebbed and flowed. About this time the Supreme Court decided *The Genessee Chief,* 12 How. 443. They

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held the admiralty jurisdiction extended to the Great Lakes regardless of the non-ebb and flow of the tide, and the statute therefore was unnecessary. It was never repealed, however, although it was a mistake and is now an anachronism, and the tendency of the courts has been to construe it as strictly as possible. *Gillette* v. *Pierce,* 10 Fed. Cas. No. 5437.

It provides that the ship *at the time* must be employed in navigation between places in different states. At the time must mean at the time that the accident occurred which is complained of. Here the appellants themselves have always been most vociferous in claiming that the ship was not at the time of this accident navigating at all, but was tied to the dock and had not begun navigating, and that, therefore, under the Harter Act cases, the limitation of liability statutes could not apply. Under their own claims, therefore, there is a serious question as to whether the statute is applicable.

(g) *The verdict of a jury under the Statute is advisory only.*

The findings of such jury are only advisory.

The Empire, 19 Fed. 558; *Sanderson* v. *City of Toledo,* 73 Fed. 220. In the *C. F. Bielman,* 288 Fed. 833 (C. C. A. 7) at 834, this Court said:

> "The jury verdict was only advisory, and the trial court, not only had the right to disregard it, but was on the record fully warranted in doing so."

Here appellants asked for a specific finding that the accident was due to wrongful manipulation of water ballast, and the master so found. The facts are fixed, therefore, the way they want them, and a jury could do no more. The rest is the application of the Limited Liabil-

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ity Act to such finding of facts, and that is purely a question of law for the Court.

(h) *A jury trial in these proceedings approaches the impossible.*

A jury trial in a case of this character would be absolutely impracticable. There can be no doubt of our right to file limitation proceedings. That right is expressly given us by virtue of the statutes. One of the purposes of the statute is to avoid a multiplicity of suits and bring into concourse in this one proceeding all claims against the owner as shown in *Butler* v. *Boston S. S. Co.*, 130 U. S. 527, and *Hartford Accident Co.* v. *Southern Pacific*, 273 U. S. 207. Here there were over 800 lives lost, there were personal injuries; there were salvage and other claims of various kinds, so that there is a possibility of 1,000 or more suits. If one is entitled to a jury trial, it means he is entitled to a jury trial by himself and could not be forced into a consolidation of actions. That would mean that the Court would have to entertain a possible 1,000 jury trials growing out of this one disaster.

If the parties should consent to consolidate and have one jury trial, this would be utterly impracticable, because each would have to prove his damages separately. The jurors could not retain in their minds or pass on any such number of individual cases.

A like situation arose in *The Rochester*, 227 Fed. 203, where there was only forty-nine claims, and the Court said at page 205:

> "* * * but there is manifest difficulty in disposing of a multiplicity of causes of action by a jury in a single suit, especially in a case like this, where the injuries sustained are such as to entitle each libelant to a separate and distinct compensation involving testimony of different witnesses in each individual case as to

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> the nature and extent of the injuries, and involving, no doubt, conflicting opinions of medical experts. I think such perplexity and confusion would attend such a trial as to make it embarrassing, if not wholly impossible, to properly decide and dispose of each case. It certainly would be extremely difficult for the jury to retain in their minds the various individual injuries complained of (49 or 50 in number if additional actions are consolidated), the testimony in relation thereto, and the different amounts of compensation to be awarded.''

This was a Great Lakes case before Judge Hazel in the Western District of New York; was not a limitation case or any special statutory proceeding, but a straight admiralty proceeding, and still the Court had no difficulty in denying the motion for a jury trial. In a limitation proceeding, which is a special statutory proceeding, in which the statutes themselves, and the rules of the United States Supreme Court promulgated in furtherance thereof, prescribe the mode of procedure, and no provision is made for jury trial, there is much stronger reason for denying jury trial. In *The Victoria,* 3 F.(2nd) 330, which was a limitation proceeding in which there were some forty-three passenger claimants, the Court had no difficulty in holding that the matter should proceed without jury trial.

It is impossible to read into the statute or the rules promulgated thereunder any provision for a jury trial. The rules specifically provide for the proof of claims to be made either before a commissioner appointed by the Court or before the Court, as the Court may determine. The right is given to any person interested to controvert or contest any claim. In other words, any claimant has a right to contest the claim of any other claimant. Questions of priority arise. How could these matters be submitted to a jury? The old statute on which ap-

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pellants rely gives a right to a jury trial under certain conditions. One of these conditions is that the question involved must be one of contract or tort. We contend that a limitation proceeding is neither. It is a special statutory proceeding. True, it may ultimately include either questions of contract or tort or both. It is analogous to a bankruptcy proceeding. It is, in fact, the bankruptcy of a ship. The ship is taken and distributed among its creditors, whether their claims arise out of contract or tort, salvage or what not. It can not be said that a bankruptcy proceeding is an action of contract or tort. In a great many instances questions of contract and tort arise in a bankruptcy proceeding but notwithstanding this it is a special statutory proceeding.

It is generally conceded that no jury trial is to be had in a limitation proceeding. There is no reported case of such a proceeding where a jury trial was granted. There is no reported case involving a demand for a jury trial in so far as we can find. A jury was asked for in the *Milwaukee,* 48 F.(2nd) 842. The demand was contained in the answer to the petition. Exceptions were sustained and the right to a jury trial denied. These proceedings do not appear from the reported opinion. We merely mention it as the only limitation case within our knowledge, other than the one before the Court, where a jury trial was asked.

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(i) *The Statute of 1845 rises to no higher dignity than the Jones Act, Title 46, Section 688, U. S. C. A. A seaman, notwithstanding the Jones Act, has no right to a jury trial in the event of proceedings to limit liability.*

The Statute of 1845 rises to no higher dignity than the Jones Act (Title 46, Sec. 688, U. S. Code), the Statute which gives to seamen the right to trial by jury, but only as the Supreme Court says "when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up."

In re East River Co., 266 U. S. 355.

X.

APPELLANTS ALLEGE ERROR BECAUSE THE DISTRICT COURT DID NOT MAKE ALL THE FINDINGS REQUESTED BY THEM BECAUSE THE COURT OVERRULED THEIR OBJECTIONS TO THE REPORT OF THE MASTER AND BECAUSE IT MADE THE FINDINGS IN SAID DECREE, AND ENTERED SAID DECREE.

This appears to be nothing more nor less than an attempt under a sort of omnibus claim to throw out a dragnet and bring in anything which they have not otherwise raised or discussed.

Of course there is no duty on a Commissioner or on a Court to find as requested by either of the parties, by special requests or otherwise.

(a) *Objections and exceptions to the rulings of the Court should be specific and not general.*

General exceptions or objections should not receive serious consideration. *The Commander in Chief*, 1 Wall. 43.

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The Waiontha, 122 Fed. 719 at 722, where the Court said:

> "The gentle hint which was embalmed, for the benefit of proctors pursuing admiralty practice in this district, on page 434 of 116 Fed. (*The John H. Starin*), seems to have had no effect whatever upon the proctor for respondent herein. It is therefore necessary to make the suggestion more forceful and impressive, and it is fortunate that the opportunity to do so arises in a matter when, under the existing circumstances, it is believed that justice impartial can be administered at the same moment.
>
> Under the rules laid down in *The Commander in Chief,* 1 Wall. 50, 17 L. Ed. 609, none of the exceptions filed ought to be discussed or investigated. They are overruled, and the report of the commissioner accepted. Let a decree be entered accordingly."

(b) *The Statute of 1875 dealing with separate findings by the old Circuit Court has no application to the Circuit Court of Appeals.*

If it is intended to raise under this point, the proposition that the Court owed the duty to mention each of these exceptions and objections *seriatim* and pass thereon, either for or against, we submit that this is neither the law nor the practice in admiralty.

The appellants cite as their only authority under this point *The E. A. Packer,* 140 U. S. 360. That case has reference to an entirely different situation, and was decided in light of a particular statute since repealed.

The point made is fully covered in *Munson S. S. Line* v. *Miramar S. S. Co.,* 167 Fed. 960, which case was cited with approval by this Court in *The Nyack,* 199 Fed. 383. In this latter case, this Court, at page 386, after quoting

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the statute referred to of 1875 requiring separate findings of fact and conclusions of law, says:

> "With practically substantial unanimity it has been held by the Circuit Courts of Appeal that the last mentioned statute has no application to those courts. This provision was intended to relieve the Supreme Court of the labor of looking into the facts found by the Circuit Court on appeals to that court from the District Court in admiralty cases. All jurisdiction of the Circuit Court in admiralty having been taken away by the Evarts Act in 1891 (Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547)) creating the Circuit Court of Appeals, the Act of 1875 relating wholly to the Circuit Court, was impliedly repealed. No Circuit Judge could thereafter make findings or do any other act in an admiralty case."

As the *Packer case* was decided under a statute now having no application, it is not authority for the proposition that this case should be reversed because the District Court did not make all the findings *seriatim* requested by appellants.

CONCLUSION.

The case before the Court has been pending for over nineteen years. Phases of it have heretofore been before this Court as well as the Supreme Court. It was referred to a Master where it was pending for four and one-half years. He heard and saw all the witnesses. The hearings were many and protracted. His report after argument on some eighty-six exceptions, was confirmed in all things by the District Court. After a final decree had been entered a motion was made to vacate the same. The whole matter was reargued before the District Court in the hearing on that motion.

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We submit that there must some time be an end to all such litigation. Upon the facts and the authorities applicable thereto appellee is clearly entitled to the relief granted it by the final decree.

We respectfully submit that as the Master heard and saw the witnesses and was confirmed by the District Court, his findings should not be disturbed unless manifestly erroneous.

We ask that the decree be affirmed.

Respectfully submitted.

FREDERICK L. LECKIE,
ROBERT BRANAND, JR.,
Proctors for Appellee.

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